



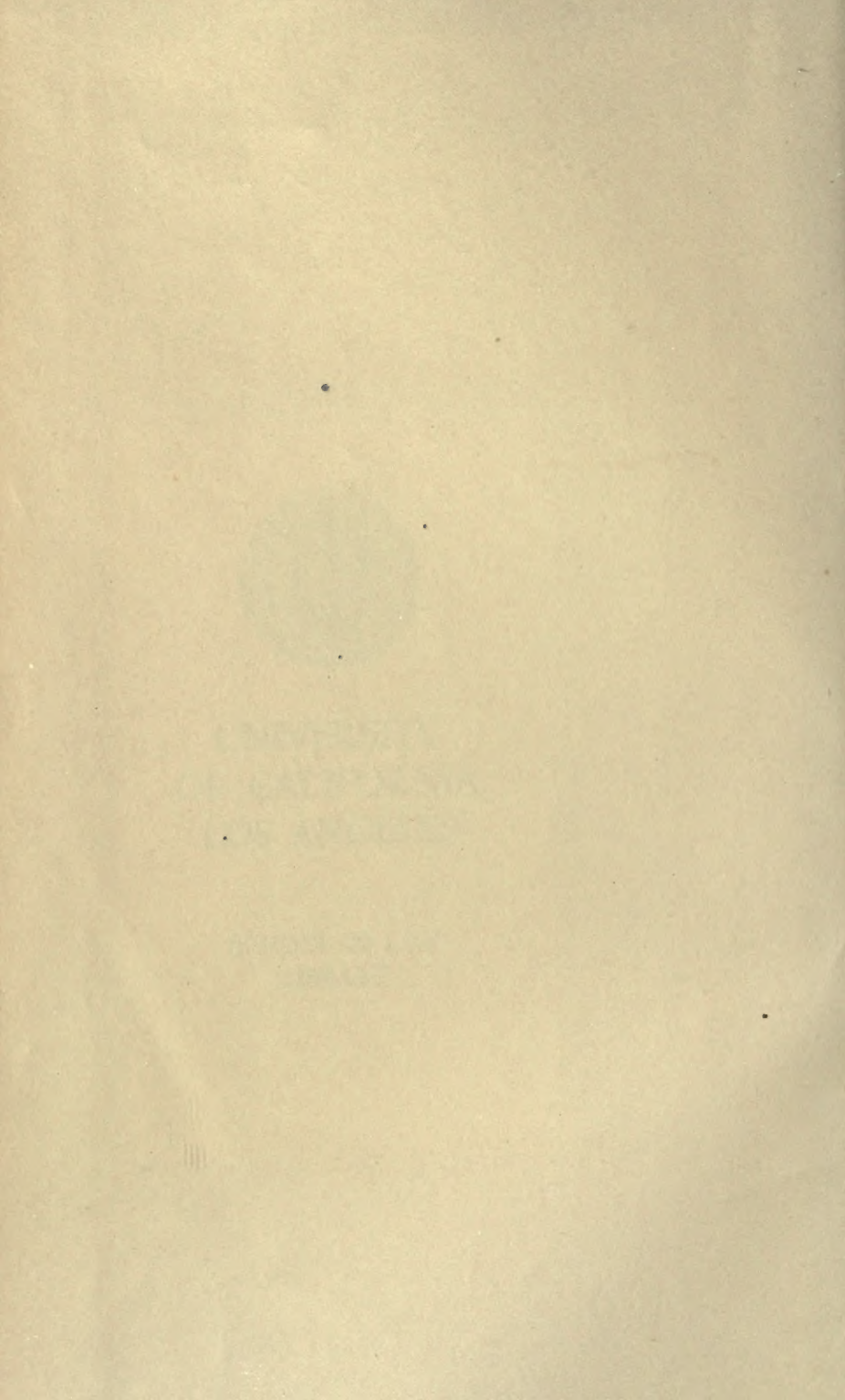
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BRADBURY'S
WORKMEN'S COMPENSATION
AND
STATE INSURANCE LAW
OF THE
UNITED STATES

A complete analysis of the compensation and state insurance laws of all the States where such acts have been passed, as well as the statutes in complete form, together with the latest British Compensation Act, with numerous notes, comments and explanations.

Including also an introduction showing the evolution of the employers' liability principle, into the workmen's compensation and state insurance doctrines in this and foreign countries.

BY
HARRY B. BRADBURY

OF THE NEW YORK BAR, AUTHOR OF "BRADBURY'S RULES OF PLEADING"
AND VARIOUS WORKS ON PLEADING AND PRACTICE, ALSO CLAIM
ATTORNEY OF THE UNITED STATES CASUALTY COMPANY

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WITH GRATEFUL ACKNOWLEDGMENT

to

MR. EDSON S. LOTT,

President of the United States Casualty Company

PREFACE

The year 1911 witnessed the beginning of an industrial revolution in America. I say "beginning," because the compensation laws thus far passed are, to a considerable extent, the result of crude efforts to grasp at a principle which has not been understood thoroughly, in all instances, by the lawmakers. A glance at the varied methods of treating the same subject, by the legislatures of different States, exhibited in the first thirty-seven chapters of this work, will demonstrate one of the worse defects (I might almost say curses) of American lawmaking. Each legislature doubtless thinks it has passed the best statute. Yet the variety is almost infinite. Thousands of employers operate in a number of States. They must learn the intricacies of the laws of each State in computing the final cost of their operations in two or more commonwealths. This book has been published to help solve these problems. The provisions of all the statutes passed thus far, on each particular subject, are compared in the first thirty-seven chapters. The texts of the laws themselves, with their paragraphs in their regular order, have been added, as doubtless some readers desire to see them in that form. There has also been added the British Compensation Act of

PREFACE

The year 1911 witnessed the beginning of an industrial revolution in America. I say "beginning," because the compensation laws thus far passed are, to a considerable extent, the result of crude efforts to grasp at a principle which has not been understood thoroughly, in all instances, by the lawmakers. A glance at the varied methods of treating the same subject, by the legislatures of different States, exhibited in the first thirty-seven chapters of this work, will demonstrate one of the worse defects (I might almost say curses) of American lawmaking. Each legislature doubtless thinks it has passed the best statute. Yet the variety is almost infinite. Thousands of employers operate in a number of States. They must learn the intricacies of the laws of each State in computing the final cost of their operations in two or more commonwealths. This book has been published to help solve these problems. The provisions of all the statutes passed thus far, on each particular subject, are compared in the first thirty-seven chapters. The texts of the laws themselves, with their paragraphs in their regular order, have been added, as doubtless some readers desire to see them in that form. There has also been added the British Compensation Act of

1906. As the constitutional questions are still important there have been appended the decisions of the courts of last resort of New York, Massachusetts, Ohio, Wisconsin and Washington, relating to the laws of those States respectively, together with the decision of the Supreme Court of the United States declaring that state courts may enforce the Federal Employers' Liability Law relating to those engaged in interstate commerce, and defining to a considerable extent the power of Congress to prescribe rules governing the relation of master and servant.

Prefixed to the work proper is an introduction showing the evolution of the employers' liability principle into the workmen's compensation and the state insurance doctrines, with a discussion of the application of each. Many comments, cross references and elucidations have been inserted where the statutes are confused, fragmentary or imperfect. Many English, Irish, Scotch and Canadian cases have been added to indicate the trend of judicial interpretation of such statutes.

This is not a mere digest or a paraphrase of the statutes of the various States on the subject of workmen's compensation. It is a reprint of the acts themselves. They are all arranged according to one convenient plan, so that a particular subject can be consulted without hunting through the entire body of the law, at the waste of much time and patience. For example, an investigator desiring to learn who are dependents under any particular statute need only turn to Chapter XVI, and to the title of the State in which he is particularly inter-

ested. The States are arranged alphabetically in each chapter.

This book is written partly in the hope of helping to bring about greater uniformity in the compensation laws. Originally the manuscript was compiled for personal use. It was found to be so helpful in practical, everyday application of the various statutes, that it was decided to publish it.

HARRY B. BRADBURY.

141 Broadway, New York City,
April 10, 1912.

INTRODUCTION

It has been said that the workmen's compensation principle begins where the employers' liability doctrine ends. At any rate the two are fundamentally different. It does not require a knowledge of the employers' liability principle to understand the one which underlies workmen's compensation.

The doctrines of assumption of risk and contributory negligence, and the rule relieving the master from responsibility for injury to one servant caused by the negligence of a fellow servant, known generally as the fellow-servant doctrine, were created by the court and not by statute law. When all three are wiped out by statute the way is left clear to define the liability of a master for injuries caused to his workmen while in his employ.

Much of the uncertainty and confusion formerly involved in the administration of the law of master and servant will undoubtedly be eliminated under compensation statutes. Payments will be made to a much larger number of injured workmen under the new than were made under the old order. Recovery of excessive "damages" will be impossible, except in those jurisdictions where an election of remedies is allowed to an employé, or where a workman is permitted to try to recover "damages" in a common-law action, and, if unsuccessful, to claim "compensation."¹ At

¹ The Departmental Committee of England in its report for 1904 (p. 93) condemned this provision of the Act of Parliament, saying: "We think the power to assess compensation after un-

the same time the payment of the smaller sums as "compensation" will be much more easily enforceable. The evidence adduced from other countries, where the experiment has been tried, demonstrates that as a rule, in the aggregate, a considerably larger sum will be paid under the compensation laws than was paid as damages under the old employers' liability statutes.

The new principle has been adopted with a suddenness, however, that has been disconcerting to those whose activities were, to a very considerable extent, confined to an administration of the old law. A somewhat rare concurrence of the opinions of those who usually are wide apart in their mental attitudes, has produced a flood of legislation, much of which has not been carefully considered. The opinions of the reformers, the views of the politicians, and the passions and prejudices of the multitude have all been favorable to, and have even demanded, compensation laws. The cry has been "Let each business stand its own losses." The author is in thorough sympathy with this principle. His occupation as claim attorney for a large casualty company has compelled him to become fa-

successful proceedings under the Employers' Liability Act should be repealed. * * * It is no protection whatever to impose upon the workman who fails, the obligation to pay, or the liability to have a deduction of costs from his compensation. The employer has in practice to bear all his own costs, whether he succeeds or not." The same provision is found, nevertheless, in the act of 1906. The principle has not been adopted generally in this country. Some States grant the workman an election whether to demand "damages" or "compensation." Usually, after he has elected to proceed on one theory he is precluded from proceeding on the other. This principle, however, is not universal, and there is a great lack of uniformity on this as on practically every other feature of the various statutes.

miliar with the terms of the law in each State, which has passed a compensation statute. Each act is constructed on a different plan. The wording of each is different from any of the others. The various provisions relating to particular topics are found sometimes in the early sections, at others in the later ones, and again in the middle of the act. Frequently several topics are mingled together in one section. Again, one topic is often treated in several sections of a single act and one part modifies the other in important particulars. There is a great diversity as to those who come within the provisions of the various acts, the amounts paid and the manner of administering the statutes, while all the acts, *in principle*, accomplish the same result. The effect of all this is that a particular subject can be found only by the expenditure of a good deal of time and patience.

To eliminate the difficulty of finding the provision of the law of any particular State, on a specified topic, the first part of this work has been divided into thirty-seven chapters, each topic or chapter, relating to a subject which is easily recognized and understood by anyone who has the slightest familiarity with the law of master and servant, so far as it relates to liability of the master for injuries caused to his servant in the course of his employment.

These new laws are based, to a very great extent, on the plans which have been tried in other countries to eliminate the unsatisfactory features of the old employers' liability acts.

Perhaps a short résumé of the experience of some of the other countries in which compensation laws have been tried will help to give a clearer understanding of the subject than would be possible otherwise.

While Germany was first in the field with compensation laws, it will lead to a better comprehension of the whole subject if, before discussing the German plan, we sketch the English doctrine of employers' liability and show briefly how it has developed into the modern compensation system. This is so because our own statutes have heretofore been modeled largely on the Acts of Parliament, and our judge-made law has followed closely the decisions of the British courts.

Undoubtedly, the most important chapter in the history of the law of a master's liability for injuries to his servant, is to be found in the case of *Priestly v. Fowler*, 3 M. & W. 1, decided in England, in 1837. In this decision the court established the doctrine that an employer was not liable for the injuries to one workman caused by the negligence of a fellow servant. This same doctrine was followed in this country five years later, in a decision written by Chief Justice SHAW, of Massachusetts (in 1842), in the case of *Farwell v. Boston, etc., R. Co.*, 4 Met. 49. Within a short time the same principle was announced by the courts of all the other States as well as by the Federal tribunals. After heated discussion in England the rule promulgated in the earlier case was confirmed and settled by a decision in the House of Lords, in 1858, in the case of *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266. The decisions show that thereafter the doctrine was applied with the greatest rigor in England. Employés in all grades of employment were held to be fellow servants with those in practically every other grade. General superintendents and general managers were declared to be fellow servants of men in the grades generally of laborers. *Conway v. Belfast & Northern R. R. Co.*, 11 Ir. L. R. 345; *Hall v. Johnson*, 3 H. & C.

589. An ordinary seaman was held to be a fellow servant of the captain. *Hedley v. Pinkney & Sons S. S. Co.*, 1 Q. B. 58; 61 L. J. Q. B. 179.

In this country the fellow-servant doctrine was not applied uniformly. The rigor of the English decisions was greatly modified by the "*alter ego*"¹ principle, which was first applied by the courts. It was subsequently seized upon by legislators as the basis upon which to construct the later rule, found in many employers' liability acts, to the effect that any person clothed with any authority to direct work or workmen, was not a fellow servant with one who was subject to the direction of the other. Again, the courts in this country held, under certain circumstances, that workmen engaged in different departments of the same establishment were not fellow servants with each other, so far as the laws of negligence were concerned.

The principles established by the courts and the statutory rules adopted by the legislatures of upwards of forty sovereign States, together with the doctrines of the Federal courts and the Acts of Congress, produced a conglomerate mass of heterogeneous hodge-podge of rules, doctrines and exceptions, which no one pretended to understand. This condition existed as long ago as 1892 when it was commented upon by the Supreme Court of the United States, in the case of *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368.

The statutory modification began in England in

¹ If the master should employ a superintendent, who, in the absence of the master, was clothed with essentially the same power and discretion which the master could exercise while present, he was held to be the *alter ego* of the master and not a fellow servant of the master's other employés. The master therefore was liable for the negligent acts of this *alter ego*.

1880 (43 and 44 Victoria, c. 42), by the enactment of a law known as the Employers' Liability Act of that year. The avowed purpose of the statute was to "bring back the law to what it was supposed to be in England before the case of *Priestly v. Fowler*."

While the British Act of 1880 made the employer liable for injuries to workmen due to defective ways, works, machinery and plant or caused by improper by-laws or lack of instructions, its chief effect on the then-existing doctrines of the law of master and servant, related to the fellow-servant rule. It declared that the master should be liable for injuries to an employé when caused by "the neglect of his superintendents," the "neglect of persons to whom he delegated his powers of giving orders," and in "the case of railway companies for the negligent management of trains, points and signals."

If we were quick to follow the decisions of the English courts, in the first instance, in establishing the fellow-servant doctrine, we were equally alert in adopting employers' liability laws, founded on the Act of Parliament of 1880.

But again the views of upwards of forty legislative bodies, each jealous of its own opinions and its own prerogatives, produced an equal number of employers' liability laws, no two of which were alike. Congress also took a hand. The National Legislature, being confined in its activities to those occupations which related to interstate commerce, adopted statutes which largely modified, and in some instances nullified, the state laws. This was true even though the employer and the employé, who were parties to a particular suit, were both residents of the same State, where the accident happened and where the suit was brought, and,

even though, under the recent decision by the United States Supreme Court, the suit was brought in the state tribunal of the commonwealth where both parties resided. *Second Employers' Liability Cases*, 223 U. S. 1.¹

The British Employers' Liability Act proved to be unsatisfactory for reasons which have been discussed frequently and exhaustively. Efforts were made on several occasions to introduce the compensation feature, but without success, until 1897, when the first compensation act was passed by the British Parliament. This act was amended in 1900, and again in 1906, after thorough discussion, and after consideration of the report of a committee² appointed to investigate the subject. The text of the Act of 1906 will be found in this work.

The British Act has none of the features of what is known in this country as "State Insurance." The liability for compensation is entirely personal to the employer. It does permit the formation of mutual associations either by a number of employers or by a single employer. But this feature of the statute is almost a dead letter. Such associations were allowed while the employers' liability laws were in force and a considerable number of them were formed thereunder. They began to decline as soon as the compensation law was adopted and at the present time very few of them are in existence. The reason for this condition of affairs appears to be the discontinuance of the employers to contribute to the funds which had theretofore been supported by contributions from both employers and employés. The governmental committee,

¹ These decisions will be found in Chapter XXXIX of this work.

² Report of Departmental Committee of 1904.

which investigated this matter, reported, in effect, that under the Compensation Act the burdens on the employers are so great that they "can hardly be expected to contribute to these funds as well as to bear the burden thrown upon them by the Act."¹

The British Act of 1906 covers all employers, individual and corporate, in every employment. In addition to compensation for accidental bodily injuries it is also allowed for disability flowing from six specified occupational diseases and such other diseases of that nature as are specified by the Secretary of State. No workman who earns more than £250 (approximately \$1,250) per year is entitled to compensation, unless he is engaged in manual labor, in which event his earning capacity is immaterial. The employer cannot relieve himself from the obligations of the Compensation Act by contract, except where some substitute scheme is agreed upon. If the injury is caused by the workman's own serious and willful misconduct compensation is not allowed, unless death or serious and permanent disability results.² The workman has the absolute right of election, after the accident has happened, to sue at common law for "damages" or demand "compensation." If his action for damages fails he may still request the court to assess compensation in his favor. The court *may*, under such circumstances, require the workman to pay all or a portion of the costs of the unsuccessful action at law for damages. This provision was severely condemned by the Com-

¹ Report of Departmental Committee (1904), p. 24.

² This provision of the British act is remarkable for its sympathetic humanitarianism, if not for its equity. No matter how willful the misconduct of a workman may be if death or serious and permanent disability ensues compensation must be paid.

mittee ¹ which made an investigation in 1904, but was nevertheless retained in the revision of 1906.

The employé must be disabled at least one week from earning full wages at his employment before he is entitled to compensation. Notice of the accident must be given as soon as practicable after its occurrence and before the injured person voluntarily leaves the service of the employer. The workman who claims compensation must submit to a physical examination by a duly qualified physician, whose services shall be paid for by the employer. The employer and the employé may agree upon the compensation to be paid and in case of dispute arbitration may be had. They can either agree on the arbitrators or apply to the county judge who shall sit as an arbitrator. During his incapacity the workman is entitled to receive weekly payments not exceeding 50% of his previous weekly earnings and in no event more than £1 (\$5) per week, the specific amount being determined by the degree of incapacity.

In case of death the amount paid to the dependents is not less than £150 (\$750) nor more than £300 (\$1,500). If the workman leaves no dependents the employer is obligated to pay not to exceed £10 (\$50) for medical and funeral expenses.

The compensation when paid is not subject to attachment in the hands of the workman. In the event of

¹ See Report of Departmental Committee of 1904, p. 19. The committee declared that "this has been found to offer a strong temptation to the less scrupulous class of solicitors to bring speculative actions on behalf of their clients under the Employers' Liability Act, or in some cases at common law with a view to driving the employer to settle on advantageous terms. * * * We think that this provision has worked largely to the disadvantage of both employer and workman and is responsible for a large quantity of illegitimate litigation."

the insolvency of the employer a workman is a preferred creditor to the extent of £100 (\$500), and in case the employer is insured the claim vests in the workman against the insurance company to the same extent that it vested in the employer. The full text of the British Act of 1906 will be found in Chapter XXXVIII.

In Germany the first compensation law was enacted on July 6, 1884. This was re-enacted and the provisions thereof extended on May 28, 1885, and again on May 5, 1886, to cover agricultural and horticultural pursuits and forestry. It was further extended on July 11, 1887, and July 13, 1887, and finally, in the year 1900, the various laws were to a certain extent unified.

Large and small industries are organized into employers' associations, grouped according to callings. These associations are self-governing bodies, and every employer is compelled by law to join the one representing his craft or trade. Upon these organizations is placed the responsibility of carrying on and administering the accident compensation system. The government has a supervising power over them, but the officers are all chosen by the members of the associations themselves, and these officers act without pay.

For the first thirteen weeks the pension of injured workmen is paid out of the sickness fund, which is supported by the employés and employers jointly, the employés contributing two thirds and the employers one third.

If the incapacity lasts more than thirteen weeks the insurance associations then become responsible. They furnish free medical attendance, including medicines, supports, crutches, etc. They pay pensions up to

two-thirds of the annual wage rate for total disability, and in proportion for partial disability. In cases of complete disability, requiring nurses and attendance, pensions up to 100% of the annual wage may be allowed.

Dependents receive free treatment in hospitals or sanitariums and pensions of a maximum of 60% of the wages of the workmen.

It has sometimes been said that the German plan was a state insurance scheme. Nothing could be further from the truth.¹ The Government maintains a somewhat strict supervision over the insurance associations, but it neither collects nor pays the funds which eventually go to the workmen as compensation for injuries. The funds are collected by the insurance associations from among their members. They administer the fund through officers chosen by themselves, most of whom act without pay. The Government supervises the fund, (except that it does not require sufficient reserves), in much the same way that the various insurance departments of the States of the Union, supervise the insurance companies doing business therein. Upon the failure of the employé to secure such an award as he deems himself entitled to receive there is a system of appeals by which the controversies are disposed of, finally by the Insurance Department.

¹ "Germany is frequently referred to as the country which best exemplifies State insurance. The fact is that in Germany, as has been stated, accident insurance is conducted *entirely* by mutual associations of employers supervised by the State, which furnishes little more than the compulsion and supervision. Even in Austria, although the State through persons appointed by it, takes a limited part in the management of these mutual associations of employers, it has not accepted financial responsibility." *Workingmen's Insurance in Europe*—Frankel and Dawson, p. 33.

Both the Government and the insurance associations have given a good deal of study to accident prevention. Elaborate and accurate statistics have been compiled. Accident prevention has become a science and a profession. Disobedience to rules relating to safety involves the infliction of penalties which are severe in some instances.

The general opinion of German employers and government officials is that the system works well. Nevertheless there is serious complaint of malingering and exaggerated claims. The measures taken for accident prevention have not proved as successful as it was hoped they would. Probably the Germans would refuse to make any radical change in the system, although admitting some abuses.

It is doubtless true that the foregoing statement will not be accepted without dispute. The opinion expressed is founded, to a considerable extent, on the letters from representative men printed in an appendix to *Accident Prevention and Relief*, by Schwedtmann and Emery. The chief authority for the opinion that the German system is unsatisfactory is to be found in the article by Dr. Ferdinand Friedensburg, who for many years was a member of the Senate of the Imperial Insurance Office. Dr. Friedensburg's article is rather pessimistic in tone. Some students of the subject have shown a disinclination to accept his opinions at their face value. This is especially true in view of the more or less earnest praise for the system contained in the letters printed in the appendix to *Accident Prevention and Relief* to which reference has already been made. Among other things Dr. Friedensburg says:

“In the very first year of accident insurance (1886),

15,863 pensions amounting to 1,547,593 marks (about \$400,000) were granted; this including indemnification for the most insignificant injuries resulting in a loss of 3 to 5 per cent of earning capacity.

"But recently there has become audible an increasing volume of protest from large organizations, worthy of respect in every way, that authoritatively voice the complaints of the tradesman, both small and great, expressly denying from the very start all hostility to workingmen's insurance in the abstract; they show how gravely German industry is handicapped in competition with foreign markets by the cost of insurance, which can now be characterized by nothing short of monstrous amounting, as it does, to almost exactly 2,000,000 marks (\$500,000) daily.

"If disregarding the burdens of taxation, we consider simply the burdening of our industrial activity with social assessments, we reach the result that even to-day the burden of contributions to insurance caused by this social policy alone amounts to nearly 800,000,000 marks (\$160,000,000) annually.—We must therefore soon reckon with a burden of about 1,250,000,000 marks (\$250,000,000) each year laid upon our industrial activity simply and solely for purposes of social insurance.

"Unfortunately, the employers of moderate or of scanty means are the very ones from whom the contributions to the various classes of insurance exact a percentage of running expenses that becomes more and more oppressive. Unlike larger firms, they are unable to recoup themselves by their power to set prices, which are determined independently of them; and, although relatively few complaints have thus far been heard from these circles, this is very possibly

because the more personal controversies between employer and employé, which in the labor world are the characteristic of time, give rise to even more bitterness and anger than these contributions to the Trades Associations. Only recently the Prussian Minister of Finance has shown, by actual statistics, how the workingman submits to a taxation by his 'colleagues' that would undoubtedly drive him to revolution if it were the State that levied it. An additional factor is terror of the Social Democrats; and, in pursuance of a train of thought that was vaguely felt by the original legislator, and which we shall consider again at the close of our study, it was believed that the threatening perils of Social Democracy might be averted by contributions toward the insurance fund—that the workingmen might be bought off, so to speak, from revolution. The extreme unwillingness to incur disfavor with this party is clearly shown by the attitude of a witness in the Moabit Riot trial, who, when asked if he belonged to it, first answered with a decided denial, then declared that he did, and ended by saying that he 'belonged to no party.'

"Should there come times when our industrial activity or even merely essential parts of it should no longer be able to meet the social obligations legally imposed upon it, then there will be no alternative except for the State as the State to assume those burdens if it is to avoid a catastrophe whose scope none can foresee even so far as social conditions will be concerned.

"The question of the degree of earning capacity still possessed by an injured person is by far the most frequent problem for decision. Yet even here—and again with entire justice—certain fixed principles

have been developed, as that the loss of an eye regularly entitles a workingman to from 30 to $33\frac{1}{3}$ per cent of the pension for complete loss of earning capacity. This very principle is one of those most constantly opposed. The Trades Associations have given the Office long extracts from the pay rolls which prove beyond all doubt that very many workingmen—if not the majority of them—receive, after losing an eye, precisely the same wages as those who have suffered no injury, and as they themselves did previous to their accident. A still more curious result arises from certain combinations of injuries to the hands or fingers. It has been shown that such injuries, when received in brawls or in other ways unconnected with the workingman's occupation, do not prevent him from gaining his old wages within a short time, for the adaptability and habituation of the human body are nothing short of marvelous. Nevertheless, an industrial accident with exactly the same results was indemnified with the pension of 30 per cent, or even more. There are workingmen, especially among those engaged in the wood industry, who draw pensions of from 30 to 40 per cent for two, three, and even four accidents of this type, which are very frequent in their occupation; and yet earn full wages.

“The question whether an accident is to be regarded as incurred in the pursuit of an occupation, whether it is, in other words, to be indemnified by an accident pension, would seem at first blush to be the problem that might most readily be solved by legal considerations, so that here benevolence would appear to have its smallest range of action. Experience, however, teaches a very different lesson. It is a recognized principle that accident insurance is awarded only for

injury by an actual accident, not for a sickness which the insured has contracted in consequences of his trade employment. Accordingly, every possible effort has been made to construe the law so as to make the Trades Association responsible in these cases as well. Industrial accident is assumed, not only in cases where the injury results from a single, sudden occurrence, but also where the injurious process did and must continue for some time in order to produce an effect prejudicial to earning capacity, such as colds as a result of working in water, heat stroke from remaining in excessive heat, paralysis from working in rooms where electric machines are in operation, and the like. A precisely similar problem emerges in cases where a sickness latent in the person insured breaks out in consequence of some process connected with his occupation, as happens, for instance, when persons with a tendency to consumption are obliged to lift and carry.

"That accidents incurred while on the way to work cannot be deemed industrial accidents scarcely requires proof, and yet all kinds of indirect ways have been devised to help those who have thus been injured to secure pensions, so that many grants have been made in cases where the employé chanced to be carrying a tool which contributed to the accident, or where his employer directed him to take a certain road, or to attend to this or that on the way, and the like.

"In 1886 the accidents reported were 100,159, and damages were awarded in 10,540 cases; in 1908 these figures were 662,321 and 142,965 respectively.

"The law sought also to protect the workingman against accidents due to carelessness and inattention, and it accordingly authorized the employer to frame

prohibitions designed to obviate any possible dangers arising from this cause. Acting on this principle, jurisdiction long maintained that a workingman who disobeyed such a prohibition which had been made properly effective placed himself 'outside his industry,' and accordingly lost all claim to a pension in case of accident. This ruling has recently been abandoned.

"It is almost absurd to see how considerations adopted in special cases to grant a pension under circumstances that would normally exclude it, penetrate into the remotest corners and become the common property of all pension hunters. The Imperial Insurance Office once decided that an accident received while chopping wood should be indemnified because it was shown that the wood in question was being chopped to boil fodder for cattle. Since that time—at least if the allegations of claimants for pensions may be believed—cattle have never and nowhere received fodder that was not boiled, nor has wood ever been chopped except to boil such fodder.

"Even in everyday life many sickly persons are inclined to overrate and exaggerate their ills and aches, and the popular modern complaint of nervousness has essentially fostered this weakness in general. Now insurance furnishes a shockingly fertile soil for this sort of nonsense, and here grows the evil and envenomed weed of pension hysteria, one of the most melancholy consequences of our workingmen's insurance. Whoever, in the course of his occupation, receives an injury, which may be of the most trivial nature and which, as has already been shown in the case of injuries to the hand would not disturb him in the least under other circumstances, guards it like a veritable treasure and tends it like a milch cow.

From unconscious exaggeration to direct invention, from neglect of the treatment prescribed to the artificial keeping open of wounds, daily, and in the case of the majority of those injured, there is found a gradation of the most diverse efforts to render their condition suitable for the payment of a pension. Every sickness and injury a man either has or ever has had is brought into connection with the accident, the allegation being either that the sickness or injury was caused or aggravated by the accident, or that it is to be regarded as accelerating its own normal consequences. Frequently an accident is deliberately invited, and is then made to serve as a plea for a pension claim, in harmony with the jurisdiction already described in cases of combinations of sickness and accident. Whether the injury is great or small makes no difference. Improvement is the last thing ever to be acknowledged. Any thought of decreasing a pension is normally answered with the assertion that the trouble is growing worse, if not with a demand that the pension be increased, and in this way an accident forms the starting-point of a series of suits which frequently do not end even at the death of the man injured, since a pensioner having other persons dependent upon him can scarcely die except as a result of an accident received in the course of his occupation, however long ago this accident may have occurred, and however remote its cause, medically speaking, from his last illness.

“Here again is manifested the lamentable phenomenon of the transformation of reason into folly and of the change of benefits intended into injuries. There is an alarmingly large number of the injured who are absolutely unwilling to be cured. The regula-

tion that the insurance carrier must sustain the costs of cure gives them a welcome opportunity to enjoy themselves in every way on another's money, since they can almost invariably find a compliant physician who will certify that the expenditures desired are necessary and proper, regardless of their relation to the patient's former modes of life and his social surroundings.

"The cost of the insurance was to be compensated for because it would aid in lessening the burdens of the poor. Curiously enough, very little is now heard regarding this promise. In reality, expenditures for the poor have increased almost everywhere, both as regards the number of those who are supported and as regards the degree of support which is given in individual cases.

"In an age which, in Prince Bülow's words, cannot abase itself low enough before 'King Mob,' this judgment has scant prospect of success. This was self-evident to me from the very instant that I began my task, yet I deem it a deed well done to have called attention once again to the all-pervading cancer that is destroying the vitals of our State."

Italy has a workman's compensation law and also a compulsory insurance statute. The insurance may be taken with any insurance company authorized to carry on business in Italy, in private accident insurance funds or in the National Accident Insurance Fund. The latter is not a State Department. It is conducted by a number of savings banks with the co-operation and assistance of certain government officials. A large portion of the expense of administration is paid by the Government from general taxation.

France has a compensation but not compulsory in-

insurance act. The law is very complicated, but contains many safeguards against insolvency of employers the principal of which is a National Guarantee Fund from which compensation is paid to the employés who are entitled to compensation under the act but are not otherwise protected.

In Norway a compensation law on a state insurance plan went into effect on July 1, 1895. It covers manufacturing only, however; agriculture, fisheries and shipping not being included. Insurance must be taken in all cases by the employer in the State Department. Administration expenses are paid by the State out of general taxes, the department being managed by governmental appointees. In non-fatal cases the employé after four weeks is entitled to medical treatment either at home or in a hospital. The expenses of the first four weeks of illness due to an accident are borne by the sickness insurance societies if the workman is insured. Otherwise the employer must bear this expense. The workman may receive as high as 60% of his wages while disabled with a maximum limit, however, of 60 crowns (\$16.20) per month.

Sweden has a compensation law but the liability is left entirely to the employer, who may carry his own risk or insure in a stock or mutual company or in the State Department. Only by insuring in the State Department, however, can he be relieved from all further liability.

Denmark has a compensation law, but without state insurance features.

Belgium has a compensation law, but not compulsory insurance. Employers escape liability, however, by insuring in a Belgian company approved by the State. The State Department of Insurance also has power to

insure employers against liability, but it has not exercised this power. A "Guarantee Fund" to insure those entitled to compensation against the bankruptcy of their employers has been established by the State. It is supported by contributions levied upon employers.

Holland has a compensation law with compulsory insurance features. But the employer may insure in any of the "recognized" insurance companies. Employers who can demonstrate their ability to carry their own risks and provide payment for their injured workmen are not compelled to insure. There is also a state insurance fund. It is optional with the employer whether to contribute to the state fund or secure insurance from a stock or mutual company.

According to Frankel and Dawson the State Department is facing a considerable deficit.¹ This is due, to a considerable extent, according to the same authority, to the fact that the State Department must accept any risk while the private companies may discriminate.

In the United States up to this time four general forms of compensation laws have been adopted.

In the State of Washington a statute has been passed and is now in operation which is generally designated as a "State Insurance Law." The name is somewhat of a misnomer. While the State, through a commission, collects and disburses the insurance fund, it does not in any sense guarantee payments, and when, in any particular industry, insufficient funds are collectible to pay the awards, they simply remain unpaid. The law had been in effect only a short time when this very condition arose. There were only three powder manufacturers in the State. An explosion in the mill

¹ *Workingmen's Insurance in Europe*, p. 59.

of a small concern at Chehalis in the State of Washington, resulted in the loss of seven or eight lives. The Commission made awards to the dependents of those killed, but there was very little money available to pay these awards, because very small sums had been collected from the powder manufacturers, and the awards to these dependents are still unpaid. The theory of the Washington law is that only the sums collected from each industry shall be used to pay for the industrial accidents in that industry. The weakness of the system is apparent when applied to a single State with the limited insurance average in respect to certain industries containing only a few plants in a particular commonwealth. It amounts practically to those plants carrying their own insurance. The only way in which an employer in the State of Washington can take advantage of the compensation principle is to adopt the state insurance scheme. Moreover, the Washington law is mandatory and requires every employer in certain industries to contribute to the state insurance fund and imposes somewhat severe penalties for his refusal.

In Ohio the statute is generally termed an "optional state insurance law." It is optional only in the fact that an employer may adopt the state insurance plan or not, as he chooses, but the only way he can embrace the compensation principle is to adopt state insurance. As to those who come under the state insurance scheme the plan of operation is much the same as that contained in the Washington law. In both the Ohio and Washington statutes the workmen can appeal from the refusal to make an award or because of the inadequacy thereof. But no appeal lies on behalf of the employers who have to pay the compensation. The decisions of the Com-

mission are absolutely final so far as the employers are concerned.

In Massachusetts the employer must insure in "any liability insurance company authorized to do business" within the State or become a subscriber to the Massachusetts Employers' Insurance Association. The compensation is paid upon awards made by the Industrial Accident Board. The Massachusetts Employers' Association is a mutual company first organized by directors appointed by the Governor and subsequently operated by directors elected from the employers who are members. This company receives no financial support from the State, except a small initial appropriation to pay preliminary expenses and a loan of \$100,000, which must be repaid. It must collect from the employers who are members enough to pay the awards to injured workmen and their dependents made by the State Board and also operating expenses. There is no provision for raising funds except by assessments on the members. There is a provision for classification of industries. Upon the failure of the employer to insure his common-law defenses are eliminated in both Ohio and Massachusetts.

The other States have passed optional compensation laws the liability being purely personal with the employer. Optional laws were passed because of the decision of the Court of Appeals in New York, in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, to the effect that a mandatory law was unconstitutional. Some of these statutes provide that the election to adopt compensation may be exercised by the employer remaining quiescent, and taking no action whatever. The New Jersey law is of this type. Others require the employer to take some affirmative action to in-

dicate that he has elected to come under the compensation statute. Such is the Act of Wisconsin. It has been felt that there could be no doubt as to the constitutionality of those acts which required both the employer and the employé to show their election by some affirmative act while there was some doubt as to the binding effect of the implied election from silence. It has seemed to the author that this distinction was of very little importance. We are all familiar with the laws which permit the waiving of such a sacred right as trial by jury, by silence. This principle is surely as important as the one relating to compensation statutes.

The various laws have been described in detail elsewhere in this work.

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BRADBURY'S
WORKMEN'S COMPENSATION AND
STATE INSURANCE LAW

CHAPTER I

ABOLITION OF DEFENSES; ELECTION OF REMEDIES

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INTRODUCTION

1. Abolition of defenses.

In paving the way for the adoption of compensation acts the first thing necessary to be done was to abolish the defenses of assumption of risk and negligence of fellow servant, and to either abolish entirely, or to modify greatly, the defense of contributory negligence. This has been done chiefly to compel employers to accept the compensation principle.¹ After the decision of

¹ It is true that all three of these defenses had been greatly modified in several States, and one or more of them had been abolished entirely in some jurisdictions prior to the enactment of compensation statutes. But it was not until the compensation feature was

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the New York Court of Appeals in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271,¹ that a mandatory compensation law was unconstitutional, the other States passed optional statutes. Then, to induce employers to come under the statutes, provision was made that their common-law defenses were eliminated unless they did adopt the compensation principle. Against employés, however, who refuse to follow their employers in accepting the compensation principle the common-law defenses are, in some of the statutes, revived in favor of their employers.

The method has been to abolish the first two entirely. As to contributory negligence, some of the acts go so far as to abolish absolutely that defense also. But most of the statutes make the willful negligence, or the willful act of the servant, sufficient ground for denying to him the right of compensation, or even damages, whenever the common-law right of action is retained at all.

Several of the acts provide that when the injury is caused by intoxication the employé shall not receive compensation. Others modify these provisions slightly, but the general trend of the various acts is as given above.

The net result has been an entire shifting of the burden of proof under the compensation feature of the statutes. Formerly the employé was compelled to show

introduced as an alternative whereby some limit could be placed on the amount of the recovery that the lawmakers generally deemed it the part of wisdom to abolish entirely the fellow-servant and assumption-of-risk rules and to modify almost to the point of abolition the defense of contributory negligence.

¹ This decision is printed in full in Chapter XXXVIII.

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negligence on the part of the master as the foundation of his action, and in many jurisdictions, until recently, that he, the employé, was free from contributory negligence.

Later, in many jurisdictions (and in some jurisdictions at all times) the master, as a defense, was compelled to show affirmatively that the servant's injury was caused by the servant's own negligence.

The compensation acts abolished all these burdens of proof by starting with the assumption, in all cases, *that neither party was guilty of negligence—that the injury was the inevitable result of the occupation in which the employé was engaged*. Then the law said to the master: "If you would escape this presumption you must show more than common negligence on the part of the servant; you must show that the injury to the servant was the result of a willful act or of his intoxication." It also said to the servant: "You must bear a part of this inevitable loss by accepting less than you could have earned if the accident had not happened, unless you can show that the master was guilty of something more than ordinary negligence. If you can prove that the master disregarded regulations prescribed by law relating to safeguards, or was willfully or grossly negligent, you may recover, not compensation merely, but also damages because of your suffering."

This subject is discussed under the particular provisions of the statute of each State.

2. Election of remedies.¹

There is more variety in the various compensation

¹ Of course there is a clear distinction between an election of remedies by an employé after an accident has happened, and the

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acts on the question of election of remedies than there is on the topic of abolition of defenses. Some of the statutes give the employé an absolute right after an accident has happened to determine whether he will demand "damages" or "compensation." A few of the laws give him a right to pursue both remedies at once; but in such cases an actual recovery under one form of action precludes further proceedings in the other.¹ In several of the acts "damages" may be recovered in cases where an employer is guilty of a violation of some specific statute and the injury is caused thereby. Some of them go so far as to permit the recovery of "double damages" or "double compensation," when the injury is caused by a disregard of a statute relating to safety devices. A considerable number of the laws, however, provide that where the employer has brought himself within the terms of the statute and the employé has not expressed his election not to be bound by

election which both the employer and the employé may exercise as to whether they, or either of them, will come within the provisions of the compensation features of the statute in any event. The latter subject naturally comes under the topic: TO WHOM THE ACT APPLIES, which is discussed in Chapter II, *post*, page 39. In the text of the present chapter is considered merely the election which the employé may make after the accident, presuming, of course, that both employer and employé have signified their intentions, in proper legal form, to accept and be bound by the features of a particular statute relating to compensation.

¹ It is not clear whether it is intended that the employé may demand both "damages" and "compensation" in one action, and recover whichever the facts proved show he is entitled to receive, or whether he must bring two actions. The solution of this question doubtless depends on the practice, as to joinder of causes of action in one complaint or declaration, in the particular jurisdiction where the claim is made.

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the law, that the right to "compensation" shall be exclusive of all other rights for remuneration because of injuries.

The constitutional question of the right of the legislature to compel the employé to accept and the employer to pay compensation for all injuries, irrespective of negligence, has had an important bearing on this subject. Since the decision of the New York Court of Appeals in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, it has been feared that the power of the legislature to absolutely compel an employer to pay or an employé to accept compensation for an injury in all cases, was doubtful, at least. Some of the law-makers, therefore, have been rather disinclined to abolish the right to sue for "damages" and have so worded the statutes as to leave it to the employer and employé to elect to pay, or to accept, compensation, upon failure of either to take some affirmative action indicating a rejection of the principle. Then to still further escape the constitutional problem, or out of a feeling of tenderness for the employé, the legislators, in some instances, have still further permitted the workman to elect, by allowing him to *demand* both "damages" and "compensation," but limiting the *recovery* to one or the other. In some instances a workman while employed in his master's business is injured through the wrong of a third party. Suppose, for example, a driver of A's team is injured by the negligence of B, who is operating an automobile. The driver could recover compensation from A. He would also have a cause of action against B, for damages. Usually, under the various statutes, he may elect which remedy to pursue. Generally speaking the employé can only have one

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recovery of damages or compensation, for a single injury. But under a set of circumstances such as described above, where the employ   recovers compensation from his employer, the latter is subrogated to the rights of the workman as against the third person who caused the injury.

Of course it is a well-recognized general rule of law that where two or more remedies are open to a person to right a particular wrong, that pursuit of one constitutes such an election as will preclude the person from subsequently pursuing the other. The same rule applies generally to compensation laws, in the absence of special statutory regulation. By the terms of the British Compensation Act if a workman sues at common law and is defeated he can ask the court to immediately assess compensation. Apart from this special provision the doctrine of estoppel by election applies. Thus where a claim for compensation was refused by the arbitrator under the Compensation Act of 1897, it was held that this was a bar to a subsequent action at common law by the workman for damages for personal injuries sustained in the accident. *Burton v. Chapel Coal Company* (1909), 46 Scotch L. R. 375; 2 B. W. C. C. 120. Where a workman has recovered compensation from his employers, he is not entitled to maintain an action against a person other than the employer, the negligence of whose servant has caused the injury for which complaint is made, even though the workman would be entitled to more by way of damages than he had received by way of compensation. *Mahomed v. Maunsell* (1907), 1 B. W. C. C. 269. Where a workman who had received injury on the premises of a person other than those of his employer and entered

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into an agreement with the owner of the premises to satisfy any claim he had against them, in consideration of such person paying his wages during incapacity for a period not to exceed six months, together with his doctor's bill, it was held that this was a recovery of damages which precluded the workman from claiming compensation from his employer, as the recovery of such damages need not necessarily be by legal proceedings. *Page v. Burtwell* (1908), 1 B. W. C. C. 267. A workman employed by contractors was knocked down and injured by a London County Council tram-car. He received payments from his employers and signed receipts which stated that the money was paid as compensation under the act. Subsequently he repaid these moneys and commenced an action against the London County Council. He then said that he had not read or understood the papers which he had signed. The County Court judge nonsuited the workman on the ground that he was estopped by the receipts. It was held on appeal in the King's Bench Division that while *prima facie* the man was bound by the receipt signed, his real intention in signing must be considered. If he did not read or understand the document there might not be an estoppel. It was held that the case should have been left to the jury for the determination of the question of fact whether the man understood the nature and effect of the receipts when he signed them. *Huckle v. The London County Council* (1910), 3 B. W. C. C. 536. An option to accept compensation under the act, instead of damages, exercised on behalf of an infant, will be set aside if it be not for the infant's benefit. *Ford v. Wren & Dunham* (1903), 5 W. C. C. 48. An option exercised by a person on behalf of an infant is

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not binding on the infant unless it be for his benefit. *Stephens v. Dunbridge Ironworks Co.* (1904), 6 W. C. C. 48. In the last-mentioned case relatives of the infant had made claim for compensation and this was paid to the infant, who signed a release in full. It was held that this did not debar the infant from maintaining a common-law action for damages.

In the pages which follow, the texts of the various statutes in the different States have been reprinted, with such elucidations, cross references and explanations as have been deemed necessary to give a clear understanding of the statutory provisions on this subject in each commonwealth.

CALIFORNIA

(L. 1911, c. 399)

1. Abolition of defenses.

“§ 1. In any action to recover damages for a personal injury sustained within this State by an employé while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé, and it shall be conclusively presumed that such employé was not

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guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employ  s contributed to such employ  s injury; and it shall not be a defense:

“(1) That the employ   either expressly or impliedly assumed the risk of the hazard complained of.

“(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

“   2. No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this act.”

2. Election of remedies.

The California Act gives an elective remedy to a restricted extent only. The claim for “compensation,” as distinguished from “damages,” is the exclusive remedy of an employ   whose employer has brought himself within the terms of the act, “except that where the injury was caused by the personal gross negligence or willful misconduct of the employer, or by reason of his violation of any statute designed for the protection of employ  s from bodily injury, the employ   may, at his option, either claim compensation under the act, or maintain an action for damages therefor.” See    3 (3), last paragraph, in Chapter II, *post*, page 132.

Also, if the accident happens under circumstances which make the Act inapplicable, the employ   may pursue the common-law remedy with the ordinary common-law defenses eliminated. See    3 (3) of the act, last sentence, in Chapter II, *post*, page 133, in connection with    1 of the Act, in this chapter.

ILLINOIS

(L. 1911, c. 000)

1. Abolition of defenses.

“§ 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That any employer covered by the provisions of this Act in this State may elect to provide and pay compensation for injuries sustained by any employé arising out of and in the course of the employment according to the provisions of this Act, and thereby relieve himself from liability for the recovery of damages, except as herein provided. If, however, any such employer shall elect not to provide and pay the compensation to any employé who has elected to accept the provisions of this Act, according to the provisions of this Act he shall not escape liability for injuries sustained by such employé arising out of and in the course of his employment because

“1. The employé assumed the risks of the employer's business.

“2. The injury or death was caused in whole or in part by the negligence of a fellow servant.

“3. The injury or death was proximately caused by the contributory negligence of the employé, but such contributory negligence shall be considered by the jury in reducing the amount of damages.”

Under a strict interpretation of the Illinois Act it has been argued that there might possibly be one contingency in which the common-law defenses of the employer would not be abolished, even though the employer should elect not to adopt the compensation principle. In the first paragraph of § 1, above, it is provided that if “any such employer shall elect not to

provide and pay the compensation to *any employé who has elected to accept the provisions of this Act*, according to the provisions of the Act he shall not escape liability," etc. As already pointed out the employer has the first and basic election as to whether or not he will accept the compensation doctrine. If the employer should elect not to accept the compensation principle his employés would be powerless to bring either their employer or themselves under the new law. In such a case, therefore, the employés would, in practical effect, have no election whatever. As a practical matter, therefore, the employés cannot elect "to accept the provisions of the Act," as to an employer who has already elected not to accept such provisions. At least such election by an employé under the circumstances cited would have no practical effect, unless it would be the *abolition of the common-law defenses of the employer*. The author is of the opinion that it must be assumed that the legislature had this condition of affairs in mind when it passed the Act and did not do a vain thing in adopting the language quoted. The legislature of course knew that it had given to the employer the first election. It knew that unless an employer elected to adopt the compensation principle the employés of such employer could not recover compensation, whatever they might do. When, therefore, the legislature under these circumstances said that if the employer should not elect to pay compensation and the employés of such employer should nevertheless "elect" to adopt the compensation principle, it seems clear that the legislature intended to abolish the common-law defenses of an employer who refused to pay compensation as to all employés who offered to be bound

by the provisions of the new law by *expressing their election* to adopt the compensation principle. Few would have the hardihood to argue that the legislature did not intend to bring about this result. It does no violence to the language of the Act to assert that this meaning can easily be spelled out of the words which are therein found.

2. Election of remedies.

The Illinois Act makes the right to "compensation" exclusive in cases to which it applies. If an employer does not bring himself within the provisions of the act then the common-law defenses are eliminated as to him. See § 1, above.

Furthermore, if the injury is caused by the "intentional omission of the employer to comply with statutory safety regulations, nothing in the act shall affect the civil liability of the employer." See § 3, below.

"§ 3. No common-law or statutory right to recover damages for injury or death sustained by any employé while engaged in the line of his duty as such employé other than the compensation herein provided shall be available to any employé who has accepted the provisions of this Act or to any one wholly or partially dependent upon him or legally responsible for his estate: *Provided*, that when the injury to the employé was caused by the intentional omission of the employer, to comply with statutory safety regulations, nothing in this Act shall affect the civil liability of the employer. If the employer is a partnership, such omission must be that of one of the partners thereof, and if a corporation, that of any elective officer thereof."

Kansas

If the employé has a right to recover either "damages" or "compensation" he may take proceedings to recover both, but a recovery under one remedy exhausts his rights. §§ 17 and 18. See Chapter XX, *post*. See also § 231½.

KANSAS

(L. 1911, c. 218)

1. Abolition of defenses.

"§ 46. In any action to recover damages for a personal injury sustained within this State by an employé (entitled to come within the provisions of this act) while engaged in the line of his duty as such or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of due care of the employer or of any officer, agent or servant of the employer, where such employer is within the provisions hereof, it shall not be a defense to any employer (as herein in this act defined) who shall not have elected, as hereinbefore provided, to come within the provisions of this act: (a) That the employé either expressly or impliedly assumed the risk of the hazard complained of: (b) that the injury or death was caused in whole or in part by the want of due care of a fellow servant; (c) that such employé was guilty of contributory negligence but such contributory negligence of said employé shall be considered by the jury in assessing the amount of recovery.

"§ 47. In an action to recover damages for a personal injury sustained within this State by an employé (entitled to come within the provisions of this act) while engaged in the line of his duty as such or for death resulting from personal injury so sustained in which recovery is sought upon the ground of want of due care of the employer or of any officer, agent or

servant of the employer, and where such employer has elected to come and is within the provisions of this act as hereinbefore provided, it shall be a defense for such employer in all cases where said employé has elected not to come within the provisions of this act; (a) That the employé either expressly or impliedly assumed the risk of the hazard complained of; (b) that the injury or death was caused in whole or in part by the want of due care of a fellow servant; (c) that said employé was guilty of contributory negligence; provided, however, that none of these defenses shall be available where the injury was caused by the willful or gross negligence of such employer, or of any managing officer, or managing agent of said employer, or where under the law existing at the time of the death or injury such defenses are not available."

As to any employer who might bring himself within the terms of the Compensation Act and fails to do so, the common-law defenses founded on the assumption-of-risk and the fellow-servant doctrines are entirely eliminated. In such a case contributory negligence is not a complete defense in any case, but may be considered by the jury in the assessment of damages.

If the employer brings himself within the terms of the act and the employé refuses to be bound by the act, then all the common-law defenses are available to the employer, except in cases of willful or gross negligence on the part of the employer, or any managing officer or managing agent thereof, "or where under the law existing at the time of death or injury such defenses are not available."

The foregoing provision of § 47 that even where the employer has elected to come within the provisions of

Kansas

the Compensation Act and the employé has refused to do so, the employer may still be precluded from setting up the common-law defenses, when the injury is caused by the willful or gross negligence of the employer "or any managing officer, or managing agent of said employer," leaves the door open for much speculation as to when the employer, in any given cases, may feel assured that his liability is measured by the compensation feature of the statute, or that he may save his common-law defenses by showing a willingness to pay compensation to his workmen. It is impossible to determine in advance how this provision will work out in practice. For example, when a case is brought to trial, at just what point does the employer learn, for the first time, that he will not be permitted to introduce evidence establishing the common-law defenses? Is this question decided in the first instance by the court or by the jury? Does the court say, after the plaintiff has put in his evidence, that the negligence of the master is willful, or gross, and, therefore, evidence of the common-law defenses will not be received? Obviously this practice would not do, as this would be trying and deciding this particular question on *ex parte* testimony. Must, then, the question be reserved until all the evidence is in? If so, who then decides it? Will the trial judge order the evidence of such defenses stricken out and direct the jury to disregard it, upon the judge's determination that the negligence of the master was willful or gross? Or will the trial judge instruct the jury that if they find the employer to have been willfully or grossly negligent then they shall disregard the evidence of the common-law defenses in reaching their verdict?

It is doubtful whether this portion of the Kansas Act is wise, necessary or workable.

2. Election of remedies.

“§ 2. *Reservation of liability for wrong or negligence in certain cases.* Where the injury was proximately caused by the individual negligence, either of commission or omission, of the employer, including such negligence of the directors or of any managing officer or managing agent of such employer if a corporation, or of any of the partners if such employer is a partnership, or of any member if such employer is an association, but excluding the negligence of competent employes in the performance of their duties or of the employer's duty delegated to them, the existing liability of the employer shall not be affected by this act, but in such case the injured workman, or if death results from such injury, his dependents as herein defined, if they unanimously agree, otherwise his legal representative, may elect between any right of action against the employer upon such liability and the right to compensation under this act.”

The basic election as to whether the relations of employer and his employé shall be governed by the compensation principle in the act rests of course with the employer. An employé cannot bring his employer within the terms of the act unless the employer first elects to embrace its provisions. Even should both elect to be bound by the compensation principle the employé may still select his remedy under certain circumstances set forth in § 2 above.

The practical effect of the foregoing provision of § 2, it is believed, is to give the employé a right to elect in

Massachusetts

virtually every case whether he will demand "compensation" or "damages."

The workman may take proceedings against one person to recover "damages" and against another to recover "compensation" for the same injury, "but he shall not be entitled to recover both damages and compensation." § 5 (a). See also Chapter III, *post*, page 182, and Chapter XX, *post*, page 353.

MASSACHUSETTS

(L. 1911, c. 751)

1. Abolition of defenses.

"Part I, § 1. In an action to recover damages for personal injury sustained by an employé in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employé was negligent.

"2. That the injury was caused by the negligence of a fellow employé.

"3. That the employé had assumed the risk of the injury.

"§ 2. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers.

"§ 3. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by employés of a subscriber.

The Massachusetts Act abolishes absolutely the three common-law defenses as to employers who do not elect to come under the compensation feature of the statute, except in actions "by domestic servants and farm laborers." The effect of this exception is

that employers of domestic servants and farm laborers may either elect to pay compensation or not as they choose. But if they do not elect to adopt the compensation principle there is no penalty attached, as there is with other employers, namely, the abolition of the common-law defenses. The judges of the Supreme Court of Massachusetts have held that this exception does not render the act unconstitutional. See opinion in Chapter XXXVIII.

The judges, in the same opinion, also declared that, "We construe clauses 1 and 2 in their reference to negligence as meaning contributory negligence or negligence on the part of a fellow servant which falls short of the serious and willful misconduct which under Part II, § 2, will deprive an employé of compensation. So construed we think that the section is constitutional. We neither express nor intimate any opinion whether it would be unconstitutional if otherwise construed. The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the constitution, and the legislature may change them or do away with them altogether as defenses (as it has to some extent in the employers' liability act) as in its wisdom in the exercise of powers intrusted to it by the constitution it deems will be best for the 'good and welfare of this Commonwealth.' See *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minnesota Iron Co. v. Kline*, 199 U. S. 593."

It would seem therefore that serious and willful misconduct on the part of an employé would defeat his cause of action against an employer in a common-law action for damages, even though the employer

should not elect to accept the compensation feature of the statute.

2. Election of remedies.

“Part I, § 4. The provisions of sections one hundred and twenty-seven to one hundred and thirty-five, inclusive, and of one hundred and forty-one to one hundred and forty-three, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, and of any acts in amendment thereof,¹ shall not apply to employés of a subscriber while this act is in effect.

“§ 5. An employé of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employé shall not have given the said notice within thirty days of notice of such subscription. An employé who has given notice to his employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after it is delivered to the employer or his agent.”

¹The statute referred to in § 4 in the text is an employers' liability act containing the provisions usually found in those statutes prior to the enactment of workmen's compensation laws. In this instance the act to which reference is made contains the provisions permitting recovery in case of injuries causing death. If, therefore, an employer, in Massachusetts, has exercised his election to embrace the compensation principle and an employé of such employer has given the proper notice that he refuses to accept compensation, the dependents of such an employé cannot recover from the employer any sum whatsoever because of the death of such employé.

"Part III, § 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both, and if compensation be paid under this act, the association may enforce in the name of the employé, or in its own name and for its own benefit, the liability of such other person."

"Part V, § 1. If an employé of a subscriber files any claim with or accepts any payment from the association on account of personal injury, or makes any agreement, or submits any question to arbitration, under this act, such action shall constitute a release to the subscriber of all claims or demands at law, if any, arising from the injury."

Of course an employé cannot elect to claim compensation unless the employer has first elected to embrace the compensation feature of the statute. Assuming that the employer has so elected the employé has only one remedy, and that is for compensation, unless he has given the notice required by Part I, § 5, above.

Even if the injury is caused by the serious and willful misconduct of the employer the employé can recover only "compensation," but in such a case the compensation may be doubled under Part II, § 3, of the act, which is printed in Chapter II, *post*, page 146. Some of the statutes give the employé the right to recover common-law "damages" when the injury is caused by the serious and willful misconduct or negligence of the employer, but the Massachusetts Act limits the recovery in such cases to double compensation.

Serious consequences may result to the dependents of the employé, should he give notice that he will not be bound by the compensation feature of the statute when his employer has taken the necessary steps to bring himself within that feature. Under such circumstances the employer is not liable for damages in case of injury causing the death of the employé. This result comes from the provisions of the statute referred to in Part I, § 4, of the act (above) as construed by the judges of the Supreme Court, passing on the constitutionality of the Compensation Act. See opinion in Chapter XXXVIII.

Section 15, of Part III, printed above, evidently refers to cases where a liability exists in favor of a workman as against a third person, not his employer. For example, a workman might be employed on a building where the employés of a number of employers were engaged. He might be injured through the negligence of an employé of an employer other than his own. In such a case he should have a common-law cause of action for "damages" against the employer of the workman whose negligence caused the injury. He would also have a claim against his own employer for compensation, if his own employer had embraced the compensation features of the statute. Under Part III, § 15, and Part V, § 1, above, the employé can only enforce one remedy. So far as he is concerned the enforcement of one waives the other. But in cases where a common-law cause of action for "damages" exists and the Massachusetts Employés' Insurance Association has paid compensation to the workman, such association can enforce the cause of action for common-law damages against the person who is

Michigan

liable therefor. Doubtless a liability insurance company which has paid compensation under similar circumstances could also recover damages in all cases where the Massachusetts Employés' Insurance Association could enforce that remedy. See Part V, § 3, as am'd by L. 1912, c. 571.

The Act as originally passed provided in very general terms that liability insurance companies issuing policies in Massachusetts should be subject to all the regulations and obligations imposed on the Massachusetts Employés' Insurance Association. By the amendment contained in Chapter 571 of the Laws of 1912, which was approved by the Governor on May 10, 1912, it is specifically provided that such liability insurance companies shall be subject to the provisions of Parts I, II, III and V and of § 22 of Part IV of the Act, and shall file with the Insurance Department its classifications of risks and premiums relating thereto and any subsequent proposed classifications or premiums, none of which shall take effect until approved by the Insurance Commissioner.

MICHIGAN

(L. 1912, No. 3)

1. Abolition of defenses.

"PART I

'MODIFICATION OF REMEDIES

"§ 1. In an action to recover damages for personal injury sustained by an employé in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense:

Michigan

“(a) That the employé was negligent, unless and except it shall appear that such negligence was willful;

“(b) That the injury was caused by the negligence of a fellow employé;

“(c) That the employé had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

“§ 2. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by household domestic servants and farm laborers.

“§ 3. The provisions of section one shall not apply to actions to recover damages for the death of, or for personal injuries sustained by employés of any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation in the manner and to the extent hereinafter provided.

2. Election of remedies.

“Part I, § 4. Any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation as hereinafter provided, shall not be subject to the provisions of section one; nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of or personal injury to any employé, for which death or injury compensation is recoverable under this act, except as to employés who have elected in the manner hereinafter provided not to become subject to the provisions of this act.”

NEVADA

(L. 1911, c. 183)

1. Abolition of defenses.

Defenses of assumption of risk and negligence of fellow servant are abolished. § 1. If the contributory negligence of the servant is slight and the negligence of the master is gross in comparison, the contributory negligence of the servant is not a defense, but the compensation may be diminished, in proportion; "and it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury."¹ § 1. See Chapter II, *post*, page 150.

The Nevada law does not provide that the common-law defenses are abolished unless the employer adopts the compensation feature of the statute, but contains peremptory provisions abolishing such defenses, without reservation. It should be observed, however, that by the last sentence of § 3 it is provided that, "The employers to whom this Act shall apply shall be any person or persons," etc., engaged in the industries specified in the previous portions of § 3. According to the terms of the Act, therefore, the provision abolishing common-law defenses applies only to the employers engaged in the industries specified and not

¹ So many subjects are often included in one section in the Nevada law that it is impossible to segregate the sections without more duplication than would be justified in reprinting the sections complete several times over. Those who desire to read the statute in its complete form will find it printed in a subsequent portion of this volume.

generally to all employers. This, in effect, is the same rule that is to be found in the other statutes, but it is worked out in Nevada in a way which is somewhat different from that found in the laws of other jurisdictions.

2. Election of remedies.

“§ 11. Nothing in this act contained shall be held or deemed to require any workman or his personal representatives to proceed under its terms and provisions for the recovery of compensation of damages for death or accidental injury. But if the workman or his personal representatives shall so elect, he or they may disregard the provisions of this act and may pursue any other remedy at law for the recovery of such compensation or damages for or on account of such death or injury. The right of election or choice of remedies shall be exercised solely by such workman or his representatives.”

The Nevada Act contains a broad provision giving the workman the absolute right to elect whether he will demand “damages” or “compensation.” While § 11, printed above, is loosely drawn, it would seem that if the workman elects to sue for damages under the common law and his employer is engaged in any of the occupations specified in § 3 (Chapter II, *post*, page 152) that then such employé can pursue the common-law remedy without the right of his employer to set up the then common-law defenses founded on the doctrines of fellow servant, assumption of risk, and contributory negligence, except as the contributory negligence doctrine is modified by § 1. Chapter II, *post*, page 150.

NEW HAMPSHIRE

(L. 1911, c. 000)

1. Abolition of defenses.

In case the employer fails to adopt the compensation features of the statute the fellow-servant and assumption-of-risk defenses are expressly abolished by §§ 2 and 3 of the act, reprinted in Chapter II, *post*, page 154. The defense of contributory negligence, however, is still retained. It is, in effect, made an affirmative defense, it being provided, in § 2, that "there shall be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed." See Chapter II, *post*, page 154.

It is further provided "that the employer shall not be liable in respect to any injury to the workman which is caused in whole or in part by the intoxication, violation of law or serious or willful misconduct of the workman." § 3. See Chapter II, *post*, page 155. The provision above quoted, however, applies only to the compensation feature of the statute.

2. Election of remedies.

The elective part of the statute is not very clear. Apparently an attempt has been made to avoid possible constitutional entanglements. By § 3 (Chapter II, *post*, page 155) it is provided "that the employer shall at the election of the workman, or his personal representatives, be liable under the provisions of § 2 of this Act for all injury caused in whole or in part by willful failure of the employer to comply with any

New Jersey

statute, or with any order made under authority of law."

Then follows § 4, which provides as follows:

"§ 4. The right of action for damages caused by any such injury, at common law, or under any statute in force on January one, nineteen hundred and eleven, shall not be affected by this act, but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this act, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury. In case after such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law or under any statute other than this act against the employer therefor, he shall be barred from all benefit of this act in regard thereto."

NEW JERSEY

(L. 1911, c. 95)

1. Abolition of defenses.

"§ I, 1. *Employé entitled to compensation for accidental injury.* Fact determined by jury. When personal injury is caused to an employé by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employé was himself not willfully negligent at the time of receiving such injury, and the question of whether the employé was willfully negligent

shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.

"2. *Certain pleas abolished.* The right to compensation as provided by section I of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employé; or that the injured employé assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances; which said grounds of defense are hereby abolished.

* * * * *

"4. *Application of act in case of death.* The provisions of paragraphs one, two and three ¹ shall apply to any claim for the death of an employé arising under an act entitled 'An Act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default,' approved March third, eighteen hundred and forty-eight, and the amendments thereof and supplements thereto.

"5. *Burden of proof on defendant.* In all actions at law brought pursuant to section I of this act, the burden of proof to establish willful negligence in the injured employé shall be upon the defendant."

The New Jersey statute is dual in character, like most of the compensation laws. It takes away from the employer the ordinary, common-law defenses of assumption of risk and negligence of fellow servant, where the action is founded on the "actual or lawfully

¹ Paragraph three applies to the liability of the principal contractor for injuries to a workman employed by a subcontractor. See Chapter III, *post*, page 185.

imputed negligence" of the employer. In such an action the workman will be defeated if the employer can show that the employé was "willfully negligent." But willful ¹ negligence is a question of fact to be determined by the jury, and the burden of proof is on the employer to prove it. Under the purely compensation features of the act, the employé or his dependants will not be defeated in his or their claim unless "the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury." Even in those cases the burden of proof is still on the employer. See § II, in Chapter II, *post*, page 157.

2. Election of remedies.

Under the common-law right of action as retained and modified in the portion of the statute printed above in this chapter, the workman can sue for any amount, provided, of course, he has not elected to accept the compensation feature in place of his common-law right of action. As will be seen under Chapter II, all employés waive the right of action under the common-law and have only such rights as are granted under the compensation feature, unless the employer or the employé takes some affirmative action before the accident happens. Both may exempt themselves from the obligations imposed upon them under the statute by an express contract to that effect in the contract of employment. § II, paragraph 9. Or either can exempt

¹ "For the purposes of this Act, willful negligence shall consist of (1) deliberate failure to act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication, operating as a proximate cause of injury." § III, paragraph 23. See Chapter XVII, *post*, page 339.

himself from the terms of the Compensation Act by a specific notice in writing to that effect. If, however, there is neither contract nor notice, both parties are bound by the provisions of § II relating to compensation and neither can assert any common-law rights.

The New Jersey Act, therefore, does not contain the elective features which are to be found in some of the statutes. That is, after an accident happens, the workman cannot elect whether he will proceed under the common law for "damages" or under the act for "compensation."

Employer is declared to be synonymous with master and includes natural persons, partnerships and corporations. § III, paragraph 23. See Chapter XVII, *post*, page 339.

Employé is synonymous with servant and includes all natural persons who perform service for another for financial consideration EXCLUSIVE OF CASUAL EMPLOYMENTS. § III, paragraph 23. See Chapter XVII, *post*, page 339.

OHIO

(L. 1911, c. 000)

1. Abolition of defenses.

"§ 21-1. *Defenses of employers not paying insurance fund removed.* All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employés for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the em-

Ohio

ployer, or any of the employer's officers, agents or employés, and also to the personal representatives of such employés where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common-law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence.

The Ohio law is an optional state insurance statute. The penalty for failure to embrace the state insurance plan is that the three common-law defenses of contributory negligence, assumption of risk and that founded on the fellow-servant rule, are abolished absolutely. There is no other alternative. An employer cannot adopt the compensation plan without also embracing the state insurance scheme. The plan is somewhat like that adopted by the State of Washington in that the insurance fund is administered directly by the State. In Washington, however, the premiums are collected from every employer, in the industries covered by the statute, in somewhat the same way that a tax is collected. There are severe penalties for failure to pay the tax, but the Washington law allows no option, on the part of the employer, to voluntarily assume these added penalties for failure to embrace the state insurance plan.

2. Election of remedies.

"§ 21-2. *Willful act of employer.* But where a personal injury is suffered by an employé, or when death results to an employé from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the

Ohio

state insurance fund the premium provided for in this act, and in case such injury has arisen from the willful act of such employer or any of such employer's officers or agents or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life, or safety of employés, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employé, or his legal representative in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage¹ on account of such injury, and such employer shall not be liable for any injury to any employé, or to his legal representative in case death results, except as provided in this act.

Every employé, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employé or his legal representative in case death results, who exercises his option to institute proceedings in court as provided in section 21-2, waives his right to any award; except as provided in section 36 of this act."

Even though an employer has adopted the state insurance plan, in Ohio, he may still, under certain circumstances, be compelled to pay "damages" in lieu of "compensation," if an injury to an employé occurs from a "willful act of such employer," or from

¹ In estimating the "damages" in a case provided for in the foregoing section the jury cannot consider any provision of this act, § 38. See Chapter XXVIII, *post*, page 533.

Rhode Island

the employer's failure to comply with any state or municipal law or regulation respecting safety devices. See § 21-2, above. While the employé has this limited election, under the foregoing provision of the law, he cannot pursue both remedies. He must exercise his option as to which remedy he will choose, and this option, once exercised, by making a claim for "compensation" or bringing an action for "damages," is irrevocable.

RHODE ISLAND

(L. 1912, c. 000)

1. Abolition of defenses.

"ARTICLE I

"ABROGATION OF REMEDIES AND DEFENSES

"§ 1. *Removal of defenses.* In an action to recover damages for personal injury sustained by accident by an employé arising out of and in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense: (a) That the employé was negligent; (b) That the injury was caused by the negligence of a fellow employé; (c) That the employé has assumed the risk of the injury."

* * * * *

"§ 4. *Employer who elects to pay compensation.* The provisions of section 1 of this Article shall not apply to actions to recover damages for personal injuries, or for death resulting from personal injuries sustained by employés of an employer who has elected to become subject to the provisions of this act as provided in section 5 of this Article."

2. Election of remedies.

"Art. I, § 7. *In lieu of other remedies.* The right to compensation for an injury, and the remedy therefor granted by this act, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employés entitled to compensation under this act while it is in effect."

WASHINGTON

(L. 1911, c. 74)

1. Abolition of defenses.

"§ 1. *Declaration of police power.* The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the State depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil

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causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this act provided."

Should the employer fail to pay his quota into the state insurance fund the employé may elect whether to sue for damages under the law as it existed prior to the enactment of the state insurance statute, or to claim compensation from the state insurance fund. Should the employé elect to sue for damages in such a case, or should the State sue the defaulting employer (as it may) after the employé has elected to take compensation, in "any suit brought upon such a cause of action the defense of fellow servant and assumption of risk shall be inadmissible, and the doctrine of comparative negligence shall obtain." See § 8 in subdivision 2 of this chapter, below.

2. Election of remedies.

"§ 8. *Defaulting employers.* If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the State as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or the husband, wife, child or dependent of such workman in case death result from the accident), as he would have been prior to the passage of this act.

"In case the recovery actually collected in such suit

shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the State for the benefit of the accident fund. In any suit brought upon such cause of action the defense of fellow servant and assumption of risk shall be inadmissible, and the doctrine of comparative negligence shall obtain. Any such cause of action assigned to the State may be prosecuted or compromised by the department in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department."

WISCONSIN

1. Abolition of defenses.

"§ 2394-1. In any action to recover damages for a personal injury sustained within this State by an employé while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

"1. That the employé either expressly or impliedly assumed the risk of the hazard complained of.

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"2. When such employer has at the time of the accident in a common employment four or more employés, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow servant.

"Any employer who has elected to pay compensation as hereinafter provided shall not be subject to the provisions of this section 2394-1.

"§ 2394-2. No contract, rule, or regulation, shall exempt the employer from any of the provisions of the preceding section of this act.

"§ 2394-32. The legislature intends the contingency in subdivision 2 of section 2394-1 of this act to be a separable part thereof, and the subdivision likewise separable from the rest of the act, and that part of said section 2394-1 that follows subdivision 2, likewise separable from the rest of the act; so that any part of said subdivision, or the whole, or that part which follows said subdivision 2, may fail without affecting any other part of the act."

The Wisconsin Act eliminates the fellow-servant and assumption-of-risk defenses, but leaves untouched the doctrine of contributory negligence, in so far as common-law actions are concerned. The act provides that the sections eliminating these defenses shall not apply to "any employer who has elected to pay compensation." In view of the fact that any employer who has elected to pay compensation cannot set up any such defenses, the exception to the elimination clause seems somewhat superfluous. See § 2394-1 (2), above.

What was really intended was that if the employer has elected to come under the compensation feature of the statute and the employé has elected before the accident happens not to be bound by the compensation

provision of the law but to retain his common-law right of action, then the employer may set up the common-law defenses in any action which the employé may bring. This, of course, is to compel the employé to adopt compensation whenever his employer has done so.

2. Election of remedies.

There is no provision in the Wisconsin Act allowing a workman to elect, after an accident, whether he will take under the compensation features or under the common law. In fact if the employer brings himself within the provisions of the act, and the workman does nothing to indicate that he has not accepted the right to compensation under the act, the employer's liability for compensation is "in lieu of any other liability whatsoever." See § 2394-4, in Chapter II, *post*, page 171. But, of course, any employé may refuse to accept compensation if he takes the proper steps before an accident happens. In such a case he may pursue his common-law right of action for damages. In that event, however, the employé may take advantage of all the common-law defenses if the employer has himself embraced the compensation features of the statute.

CHAPTER II

TO WHOM ACT APPLIES

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1. Election to accept the compensation principle.

The various statutes contain different methods of bringing the employers and employés within the terms thereof. Because of the decision in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, that employers could not be compelled to adopt the compensation principle in such legislation, all the subsequent acts ¹

¹ The first compensation act in this country was passed by the State of New York. This was a compulsory act, as to certain

Election to accept compensation principle

except that of the State of Washington, contain some kind of an option which the employer may exercise or not as he chooses. The employés also have an election whether or not to accept compensation, even though the employer has declared in its favor. The first, or basic, election, however, rests with the employer. When the employer has failed to adopt compensation his employés cannot, by anything which they may do, compel their employer to embrace that principle. Once the employer has declared in favor of compensation then his employés still have an election whether or not they also will be bound by that principle.

Certain methods have been used to coerce both employers and employés to adopt compensation. If the employer fails to adopt it he is punished by taking away the common-law defenses of assumption of risk, negligence of fellow servant and in some cases, that of contributory negligence of the plaintiff. If, on the other hand, the employer declares in favor of compensation and his employés decide not to accept that principle, then the employer may take advantage of such of the common-law defenses as are still permitted under the terms of any particular act, in any actions which are brought against him by his employés so deciding.

There are two general methods of electing to be bound by the compensation principle. One may be said to be positive and the other negative. For ex-

especially hazardous employments. In other words, it compelled the employers in those employments to adopt the compensation principle. The act was declared to be unconstitutional in the case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, which decision is printed in full in a subsequent portion of this volume.

Election to accept compensation principle

ample, in New Jersey, both employers and employés are *presumed* to have accepted the compensation principle, unless they take some affirmative action to indicate to the contrary. This may be termed the negative method. In other States, like Massachusetts, for example, an employer can adopt the compensation principle only by taking some positive action, that is, doing the acts which the statute requires and posting notices in his places of business indicating his election.

Either one of these two methods, with slight variations, will be found in all the compensation statutes, except in that of the State of Washington. In that commonwealth a purely state insurance law has been passed, which is obligatory on all employers and employés as well, in the occupations which the act includes. There are certain penalties for nonpayment of the premiums or assessments to the State Insurance Fund, but the employer cannot relieve himself from the obligation to pay compensation by such default. He must pay the compensation premiums in addition to the penalties.

As heretofore stated, no two of the Compensation Acts are exactly alike. In this chapter there will be found indicated the employers and employés who are included in the various state acts, as well as a good deal of discussion relating to the general principles found in all the acts. For example, while the definition, or term, or phrase "arising out of and in the course of the employment" does not appear, in so many words, in all the statutes, it is practically the basis of each of them, in principle, in determining whether or not an employé is entitled to compensation for an injury while in his employer's service. In elucidating this and many other topics a large number of English, Scotch, Irish

and Canadian cases have been cited, where decisions have been made on provisions in the British or Canadian Compensation Acts which are similar in principle to these found in the American state statutes.

2. Acceptance of compensation principle as to part only of employés.

One of the most important questions that has arisen at the threshold in the adoption of the compensation principle, relates to the right of an employer to accept that principle as to a portion of his employés and reject it as to the remainder. As all the laws thus far passed, except the state insurance law in the State of Washington, are elective statutes, it follows that the employer has the first right of election, whether or not he will adopt the compensation principle. Of course, he does this either by silence or by some affirmative act, according to the provisions of the particular statute under which he operates. The question has arisen: Can the employer discriminate in making this election between different classes of employés? Can he bring in shop hands and exclude traveling salesmen, or clerical employés? Can he include those in a particularly hazardous portion of his establishment and exclude the others in a less dangerous occupation? It has been urged that the employer has the right to make this discrimination, for the reason that the employés have the right of individual election whether or not they shall be bound by the employer's election to adopt compensation. The employé's right exists as to the different employés in the same shop. Some may accept the compensation principle, as adopted by the employer, while others may reject it, and stand on their common-law

Acceptance of compensation as to part of employés

right of action, for injuries suffered in the master's employment.

The only decision on the point, so far as the author is aware, is that made by the Industrial Commission of Wisconsin. To a question by an employer as to the right to file a qualified election to come under the compensation law the Commission replied as follows:

"Under the Compensation Act, if you file a general notice of election, all your employés will be covered as to all accidents happening in the course of their employment in the State of Wisconsin. The law will not cover accidents happening outside of the State. Some few employers have filed modified notices of election; for instance, they have, in one or two instances, excluded their traveling salesmen in the notice of election filed. There is some doubt about the legality of such filing of notice and the Commission does not advise modified notices of this kind, but if you choose to file such a notice, the Commission will administer the law, and leave it to the courts to say whether it is sufficient to exclude a part of your employés. The writer suggests that if you desire to exclude your traveling salesmen from the operation of the law you can do so by having an understanding with the salesmen to that effect, and that within thirty days from the time you file your notice of election, your traveling salesmen may serve upon you a notice to the effect that they do not desire to come under the Act."

The author is of the opinion that the establishment of the right to make a qualified election would lead to confusion and probably to abuses. It is believed that should the courts sustain such a right under the compensation statutes that this privilege would be abol-

ished very speedily by statutory amendment. The statutes themselves specify the classes of employés which come within their terms. Should employers be permitted to make other classifications this would amount, in effect, to material amendments to the statutes. The author is of the opinion, therefore, that employers must elect as to all of their employés or as to none, in spite of the right of each employé to elect separately.

3. Accidents happening without the State of the residence of the employer or the workman.

Many complicated and serious questions doubtless will arise over the right to compensation, where an injury occurs in one State and the employer or the employé resides in another; or where it occurs in a State where neither of them resides. Naturally, the compensation laws, like other state statutes, have no extraterritorial effect. That is, should the employer and employé both reside in New Jersey, for example, and the employé should be sent into the State of Pennsylvania on the employer's business, and there injured (there being no compensation law in Pennsylvania), such employé could not recover compensation in New Jersey. The same rule has been established in Great Britain.

The Workmen's Compensation Act of 1906 has no extraterritorial force, and so is not operative outside of the confines of the United Kingdom, and "any employment" in § 1 (1) of the Act is restricted to employment within the boundaries of the United Kingdom, except in the case of seamen who are especially provided for by § 7. It was held, therefore, that the dependent of a workman who was a domiciled English-

Accidents happening without the State

man employed by English employers under a contract of service entered into in England, who was killed by an accident arising out of and in the course of his employment while working in a place beyond the limits of the United Kingdom, was not entitled to compensation under the Act. *Tomalin v. S. Pearson & Son* (1909), 100 L. T. 685; 2 B. W. C. C. 1.

A charwoman residing at Dover, England, was taken by her employer, a French woman, to Calais, France, on two occasions to do work in the employer's house, and while at Calais she suffered an injury. It was held that the Compensation Act did not apply when the action was brought in the County Court at Dover. *Hicks v. Maxton* (1907), 1 B. W. C. C. 150.

It is held that where an action is brought in one State, for injuries causing death in another State, that the plaintiff may show that the law of the State in which the accident occurred permits recovery for death in such cases, provided the statute of the State where the accident happened is *similar*¹ to that of the State in which the action is brought. *Howlan v. N. Y. & N. J. Telephone Co.*, 131 App. Div. (N. Y.) 443; 115 Supp. 316; *Zierner v. Crucible Steel Co.*, 99 App. Div. 169; 90 Supp. 962; *Johnson v. Phoenix Bridge Co.*, 133 App. Div. 807; 118 Supp. 88.

An action may be maintained in the courts of a State founded on the Federal Employers' Liability Act. *Second Employers' Liability Cases*, 223 U. S. 1 (Reprinted in Chapter XXXVIII, *post*); *Payne v. N. Y., Susquehanna & W. R. Co.*, 201 N. Y. 436. It seems also that an action may be maintained in the courts of one State, based, partly at least, on an employers'

¹ Not necessarily identical.

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liability act of another State. *Payne v. N. Y., Susquehanna & W. R. Co.*, 201 N. Y. 436.

It has been urged that if an employer and an employé both resided in Pennsylvania, where there was no compensation law, and the employé should go on the employer's business into the State of New Jersey, where there was such a statute, and should there be injured, that the Pennsylvania courts would enforce the right to compensation under the New Jersey law, if the employé in his suit should plead and prove the New Jersey statute. Such cases are complicated, however, by the preliminary question as to whether or not the employer has exercised his option to adopt the compensation principle. A serious question might possibly arise, under the circumstances recited above, as to the laws of those states, including New Jersey, where the terms of the compensation acts are presumed to have been adopted by silence on the part of the employer. Of course, the question could not arise at all as to those States in which the employer must take some affirmative action to indicate that he has adopted the compensation principle. In the latter States, if the employer has remained silent, there is no doubt that the employé could not enforce compensation in the courts of the State of his and his employer's residence, which had no compensation law, for an accident which happened in the other State, which had one. But should the employer send his employé on the employer's business into an adjoining State where the compensation law is presumed to have been adopted by the silence of the employer, it may possibly be that on the principle of the cases cited above under the Employers' Liability Act, the employé would be able to enforce his

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right to compensation under the laws of the State to which he was sent, in the courts of the State of the residence of his employer and himself, for an injury occurring in the State to which he was sent. The author is of the opinion, however, that the state court would not enforce such a cause of action unless the laws of its own State recognized the general principle of "compensation." *Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10; *Howlan v. N. Y. & N. J. Telephone Co.*, 131 App. Div. 443; 115 Supp. 316. Otherwise the courts of a State where a compensation law had been declared to be unconstitutional might be called upon to sustain an action under a similar law of another commonwealth.

4. Accidental bodily injury.¹

All the acts contain in one form or another the expression, or the idea in other words, of an accidental bodily injury, as being the basis of compensation. If a workman intentionally inflicts an injury to himself, of course it is not "accidentally" inflicted. There were a number of American cases on this subject, decided prior to the adoption of the compensation laws, which are still applicable. But the compensation statutes have so broadened the field by eliminating the question of the master's negligence as an element in an accidental injury, that not all of the American cases can now be considered as precedents to be followed under the new doctrine. The English, Irish, Scotch and Canadian cases arising directly under compensation statutes will be found thoroughly covered in the pages

¹ See also next title, "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

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which immediately follow. Some American cases which have been found to be still applicable have been inserted also. The italic topical first lines will guide the investigator to the solution of his own particular question.

In relation to an accident insurance policy the United States Supreme Court has defined the term "accidental" as follows: "The term 'accidental' was used in the policy in its ordinary, popular sense, as meaning happening by chance; unexpectedly, or as not expected. If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means. But if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces injury, then the injury has resulted through accidental means." *Mutual Accident Assn. v. Barry*, 131 U. S. 100, 121; 9 Sup. Ct. R. 755; 33 L. Ed. 60.

Word accident to be used in popular or ordinary sense. The question of whether or not an injury is an accident within the meaning of the Act is a mixed one of law and fact. *Roper v. Greenwood* (1900), 83 L. T. 471; 3 W. C. C. 23. The House of Lords has held that the word "accident" is to be used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed. *Fenton v. Thorley & Co.* (1903), A. C. 443; 5 W. C. C. 1. In the last-mentioned case the workman had by over-exertion ruptured himself in trying to turn the wheel of a machine in the ordinary course of his employment, and it was held by the House of Lords that he had suffered an accident within the meaning of the Act.

Question of law when applied to ascertained facts. Un-

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der the British Act the meaning of the word "accident," when applied to ascertain facts has been decided by the House of Lords to be a question of law. *Fenton v. Thorley & Co.*, 19 T. L. R. 684.

Lightning. Where a bricklayer working on a scaffold twenty-three feet from the ground was struck by lightning and killed it was held that the accident arose out of the employment and the widow was entitled to compensation. *Andrew v. Failsworth Industrial Soc.* (1904), 90 L. T. 611; 6 W. C. C. 11. The last mentioned case was decided by the Court of Appeal of England. The case was not decided squarely on the ground that in all cases where a workman was killed by lightning his dependents would be entitled to compensation. The judgment of the court below was adopted to the effect that this particular workman was in a more than ordinarily dangerous position as to lightning.

Attack by strikers. It has been held that an injury sustained by a workman during an attack on the works by strikers is not an injury by accident. *Murray v. Denholm & Co.* (1911), 48 Scotch L. R. 896; distinguishing *Nisbet v. Rayne & Burn* (1910), 2 K. B. 689; 3 B. W. C. C. 507, where a cashier employed regularly to carry wages by train to a colliery, was shot by a stranger and the wages were stolen and it was held that his dependents were entitled to compensation.

Attack by poachers. A gamekeeper, while in the discharge of his duties, was attacked by poachers and injured. It was held that this was a personal injury by accident. *Anderson v. Balfour* (1910), 44 Irish L. T. 168; 3 B. W. C. C. 588.

Murder committed by robber. A cashier employed

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regularly to carry wages by train to a colliery was shot by a stranger in the course of the journey and the wages were stolen. It was held that his death was caused by an accident and that the accident arose out of and in the course of his employment. *Nisbet v. Rayne & Burn* (1910), 2 K. B. 689; 3 B. W. C. C. 507.

Sailor on board his ship in foreign port hit by stray bullet shot by revolutionist. The applicant for compensation was quartermaster on the steamship "Warrior." Upon arriving at Pernambuco, Brazil, it was learned that a revolution was in progress and fighting was plainly heard in the town. The members of the crew were not permitted to go on shore in consequence. While the applicant was engaged in his duties on the ship he was hit by a stray bullet and wounded. It was held by the Liverpool County Court that the connection between the employment and the accident was too remote to entitle the applicant to compensation. The court said that the risk was one not ordinarily incident to the employment of a seaman, nor a special risk which could reasonably be foreseen and to which the applicant was ordered to expose himself. Moreover, the applicant was not specially exposed as compared with anyone else within range of the shots. Compensation was therefore refused. *McShane v. Harrison* (March, 1912), reported in "The Policy Holder," April 10, 1912, page 296.

Drowning from tug. An engineer who was employed on board a small steam tug, was last seen asleep in his bunk at 5 A. M. An hour afterward he had disappeared, leaving his working clothes lying at the side of his bunk. The tug was to commence towing at 7 A. M. that morning and steam had been ordered to be got up for

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that hour. The deck was a place where between five and seven A. M. he was entitled to be. Two days afterward his body, clad in his ordinary sleeping clothes, was found in the water near the place where the tug had been moored on the morning in question. The examining physician testified that the man's death was due to drowning. It appeared in evidence that he was unable to swim, but there was no direct testimony as to how the deceased had met with his death. It was held that the arbitrator was entitled to draw the inference of fact that the workman had accidentally fallen overboard and been drowned, and that the accident arose out of and in the course of the man's employment. *Mackinnon v. Miller* (1909), 46 Scotch L. R. 299; 2 B. W. C. C. 64.

Condition due to defective medical treatment. It seems that a workman is entitled to compensation, although his condition is attributable to defective medical treatment. *Beadle v. Milton & Others* (1903), 114 L. T. 550; 5 W. C. C. 55. Whether present incapacity for work results from the injury or from neglect of medical or surgical advice is a question of fact. *Smith v. Cord Taton Colliery Co.* (1900), 2 W. C. C. 121.

"Larking" or joking. One of two boys was injured in avoiding a handful of rubbish which was thrown at him by another boy, and it was held that the accident did not arise out of the employment. *William Baird Co. v. Burley* (1908), 45 Scotch L. R. 416; 1 B. W. C. C. 7. A boy set to clean a machine at rest was "larking" with another boy and accidentally started the machine thereby injuring himself, and it was held that the accident did not arise out of the employment. *Cole v. Evans*,

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Son, Lescher & Webb (1911), 4 B. W. C. C. 138. To the same effect, *Furniss v. Gartside & Co.* (1910), 3 B. W. C. C. 411.

Piece of steel hitting eye. While engaged in chipping the burs from a steel plate with a cold chisel, the workman was injured by a piece of the steel so chipped off, striking him in the eye and destroying his sight. It was held that this was an accident within the meaning of the British Compensation Act. *Neville v. Kelly Bros. & Mitchell* (1907), 13 B. C. 125; 1 B. W. C. C. 432.

"Heat stroke." A seaman employed as a trimmer on board the steamship *Majestic* while engaged in drawing ashes from the ship's furnace, had a "heat stroke" and died therefrom about two hours afterwards. The seaman was in a weakly state of health and of low vitality when he entered upon his duties, and consequently liable to such attack. It was held by the House of Lords, upholding the decision of the Court of Appeal in Ireland, that the "heat stroke" was a personal injury by accident. *Ismay-Imrie & Co. v. Williamson* (1908), 42 Ir. L. T. 213; 1 B. W. C. C. 232. In the last-mentioned case the Lord Chancellor said: "To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not. * * * In my view this man died from an accident. What killed him was a heat stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt,

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threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked-for mishap in the course of his employment. In common language, it was a case of accidental death. I feel that, in construing this Act of Parliament, as in other cases, there is a risk of frustrating it by excess of subtlety, which I am anxious to avoid." Citing *Fenton v. Thorley & Co.* (1903), A. C. C. 443; 5 W. C. C. 1, with approval.

A fireman on board ship was seen frequently drinking water while in the stoke hole. Soon after he was found to be very ill. He next became unconscious and died. No post-mortem was held and the medical evidence as to the cause of death was conflicting. The County Court judge granted compensation, and on appeal it was held that the question as to whether or not the workman did, in effect, sustain a personal injury by accident, arising out of and in the course of the employment, was one of fact for the County Court judge to decide. *Johnson and Others v. Owners of Ship "Tor-rington"* (1909), 3 B. W. C. C. 68.

Sunstroke. Sunstroke has been held to constitute an accidental injury. *Morgan v. Owners of S. S. Zenaida* (1909), 25 T. L. R. 446; 2 B. W. C. C. 19. The last-mentioned case was decided by the Court of Appeal of England. The applicant, an ordinary seaman, while engaged in painting the vessel when she was lying at a port on the coast of Mexico was incapacitated by sunstroke. The medical evidence was to the effect that a seaman painting the outside of a ship is running a greater risk of sunstroke than when employed on deck, because he not only gets the direct rays of the sun, but he also gets the reflected rays from the ship's side.

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Sunstroke, however, is generally classified as a disease rather than an accident. *Dozier v. Fidelity & Casualty Co.*, 46 Fed. 446; 13 L. R. A. 114.

Inflammation of kidneys from working in water. A workman was employed in a millrace, where he had to work for a fortnight up to his knees in water. As a result he contracted inflammation of the kidneys and died. It was held that this was a personal injury by accident. *Sheeran v. F. & J. Clayton & Co.* (1909), 44 Irish L. T. 52; 3 B. W. C. C. 583.

Frostbite. Whether or not an injury caused by frostbite sustained by a van driver was an accident was discussed, but not decided, in the case of *Warner v. Couchman* (1911), 1 K. B. 351; 4 B. W. C. C. 32. In the last-mentioned case a journeyman baker, a portion of whose duty it was to drive his master's cart and deliver bread, was frostbitten in the hand. It was found that there was nothing in the man's employment which exposed him to more than the ordinary risk of cold to which any person working in the open was exposed on the day in question. It was held by the Court of Appeal of England that this was not an accident arising out of the employment within the meaning of the Act.

In another case a seaman at work on his ship at Halifax, N. S., sustained frostbite. The judge found that the workman had not proved that the frostbite was due to any particular circumstance in connection with his employment, nor had he been exposed to more risk of frostbite than is usual in winter at Halifax, and it was held that the accident did not arise out of the employment. *Karemaker v. Owners of S. S. "Corsican"* (1911), 4 B. W. C. C. 295. In the last-mentioned case the court said: "Halifax is a place where people do receive

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frostbite, and therefore it is proper and necessary to take steps to guard against it. In that sense the liability to frostbite is one of the normal incidents to which everybody is subjected by reason of the severity of the climate."

"*Beat hand*" or "*beat knee*." Contracting "*beat hand*" or "*beat knee*," a miner's disease or injury caused by the gradual process of continued friction, is not an accident. *Marshall v. East Holywell Coal Co.* (1905), 7 W. C. C. 19.

Rupture. Rupture caused by overexertion in the course of a man's work is an accident within the meaning of the Compensation Act. (House of Lords), *Fenton v. J. Thorley & Co.* (1903), 89 L. T. 000; 5 W. C. C. 1. The court disapproved of the cases of *Hensey v. White* (1900), 1 Q. B. 481; 2 W. C. C. 1; *Roper v. Greenwood* (1901), 83 L. T. 471; 3 W. C. C. 23, and approved of the decision of the Court of Sessions in Scotland reported in the case of *Stewart v. Wilsons & Clyde Company* (1903), 5 F. 120. The court also cited in support of the doctrine announced the following American cases: *United States Mutual Accident Ins. Ass'n v. Barry* (1888), 131 U. S. 100, and *North American Life & Accident Ins. Co. v. Burroughs*, 69 Penn. 43.

A workman who was slightly ruptured at the time he entered the employer's service, in the course of his work had to subject himself to an unusual though not to a unique strain. The result of this strain was to increase the rupture and incapacitate the workman from following his employment. It was held that although from a purely medical or surgical view, the injury could not be said to be an untoward or unexpected event, it was nevertheless an accident within the meaning of the Act.

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Fulford v. Northfleet Coal & Ballast Co. (1907), 1 B. W. C. C. 222. A workman who had been operated on for a hernia subsequently was compelled to wear a truss because of the reappearance of the hernia. Several months after he began wearing the truss, while he was driving cows over some moorland country the rupture came down and became strangulated. He was operated upon again but died from exhaustion. It was held that there was no evidence to support an inference that the deceased met with an accident. *Walker v. Murrays* (1911), 48 Scotch L. R. 741; 4 B. W. C. C. 409.

A workman who ruptured himself while lifting some planks in the usual course of his employment was held to have suffered an injury by accident. *Timmins v. Leeds Forge Co.*, 16 T. L. R. 521.

Sprains and strains. A workman in his master's field, finding that the grain had been trodden down by bullocks, stooped to raise it and sprained his left leg. This injury subsequently developed into traumatic phlebitis and it was held that this was a personal injury by accident within the meaning of the Compensation Act. *Purse v. Hayward* (1908), 1 B. W. C. C. 216. A man at work called out that he had hurt his back. No one saw what had happened. He was taken home complaining of pains in the back and stomach. He died a week later of intestinal obstruction. There was evidence of previous illnesses and pains in the stomach. It was held that the onus of proving an accident had not been discharged. *Farmer v. Stafford, Allen & Sons* (1911), 4 B. W. C. C. 223. An internal injury caused to a person in a normal state of health by a fortuitous and unforeseen event in the usual course of his business is an accident. So held in a case where a workman

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while lifting a heavy beam suddenly tore several fibers of the muscles of his back. *Boardman v. Scott & Whitworth* (1901), 3 W. C. C. 33, aff'd (1901), 85 L. T. 502; 4 W. C. C. 1.

A woman suffering from an ailment which she knew would be aggravated by lifting boxes which were too heavy for her, notwithstanding continued the work and strained herself. It was held that this was not an accident. *Roper v. Greenwood* (1900), 3 W. C. C. 23.

A man was employed in moving heavy planks from one pile to another. During the night the planks were all frozen together so that there was some difficulty in separating them. The lower planks in the pile were more firmly stuck together than those above, but the man was not aware of this. He sustained an injury owing to the difficulty of moving one of the lower planks. It was held that there was evidence of an accident. *Timmins v. Leeds Forge Co.*, 2 W. C. C. 10.

The word "accident" involves the idea of something fortuitous and unexpected. A man who was not in a sound condition of health injured himself when doing his ordinary work which was somewhat harder than usual. It was held that the injury was not caused by accident. *Hensey v. White* (1900), 81 L. T. 767; 2 W. C. C. 1.

Overexertion. A workman, in the course of his ordinary and usual employment, overexerted himself and eventually brought on an attack of cerebral hemorrhage, and it was held that the occurrence was an accident within the meaning of the Act. *M'Innes v. Dunsmuir & Jackson* (1908), 45 Scotch L. R. 804; 1 B. W. C. C. 226. See to the same effect, *Martin v. Travelers' Ins. Co.*, 1 F. & F. 505.

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Apoplexy. A collier died of apoplexy during working hours in a mine. The majority of the doctors said that his arteries were in a very diseased condition, and that apoplexy might have come upon him when asleep in bed, or when walking about, or when overexerting himself. The collier's work on that day was to build a pack, but there was no evidence that apoplexy came upon him when he was incurring a strain. It was held that as the evidence as to the cause of death was equally consistent with an accident and with no accident, and the onus of proving that it was due to accident rested on the applicants, in this case that onus had not been discharged by them. *Barnabas v. Bersham Colliery Co.* (1910), 4 B. W. C. C. 119.

Fits causing fall. Where a laboring man working near an open hatchway was seized with epileptic fits and fell down the hold, it was held that this was an accidental injury even though the having of the fit itself, if it had taken place under circumstances such as not to cause an injury, would not have been an accident. *Wilkes (or Wicks) v. Dowell & Co.* (1905), 2 K. B. 225; 7 W. C. C. 14.

Heart disease. A workman had for years been suffering from progressive heart disease. While hurrying to the station with a parcel, in the course of his employment, he was taken ill and died. It was held that the death was attributable to the disease and that there was no evidence of accident within the meaning of the Act. *O'Hara v. Hayes* (1910), 44 Irish L. T. 71; 3 B. W. C. C. 586.

A workman suffering from an advanced aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain

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caused a rupture of the aneurism, resulting in death. The County Court judge, on conflicting evidence, found that the workman's death resulted from personal injury by accident within the meaning of the Act. It was held in the House of Lords that there was evidence on which the County Court judge was justified in so deciding. *Clover, Clayton & Co. v. Hughes* (1910), A. C. 242; 3 B. W. C. C. 275, aff'g 2 K. B. 798; 2 B. W. C. C. 15. The above-entitled case was considered at great length in the various opinions written in the House of Lords. Lord LOREBURN wrote the principal opinion, and in the course of it he said: "In this case a workman, suffering from an aneurism in so advanced a state of disease that it might have burst at any time, was tightening a nut with a spanner, when the strain, quite ordinary in this quite ordinary work, ruptured the aneurism, and he died. This is a mere summary of the facts. * * * In what I am about to say I take the facts as he found them *in extenso* and reply upon them. * * * It may be said, and was said, that if the act admits of a claim in the present case, every one whose disease kills him while he is at work will be entitled to compensation. I do not think so and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together,

looking at it broadly? Looking at it broadly, I say, and free from over nice conjectures: Was it the disease that did it or did the work he was doing help in any material degree? In the present case I might have come to a different conclusion on the facts had I been arbitrator, but I am bound by the findings, if there was evidence to support them. It is found that the strain contributed to the death. There was evidence on which the learned judge was entitled so to find, as I respectfully think, and I, therefore, advise your Lordships to affirm the order of the Court of Appeal." There were two dissenting opinions filed by Lords ARKINSON and SHAW.

Cardiac breakdown due to heavy work. A workman who, while engaged in work which was too heavy for him, felt a sudden pain upon his chest, a few days afterward became totally incapacitated. In an application for compensation the arbitrator found as a fact that the cause of the incapacity was a cardiac breakdown due to the fact that the work in which the workman had been engaged was too heavy for him and that he was not injured by any sudden jerk. It was, therefore, held that the repeated excessive exertion strained the workman's heart until it was finally overstrained. Under these circumstances, it was held that the incapacity was not due to a personal injury by accident within the meaning of the Act. *Coe v. Fife Coal Co.* (1909), 46 Scotch L. R. 325; 2 B. W. C. C. 8.

Syncope. While a workman was driving a cart the horse fell, the shaft broke, and the man apparently was thrown out. He went to a farm to borrow another cart; being unsuccessful in this he walked away with the horse and was subsequently found dead on the

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road at the top of a hill. The medical evidence was that he died from syncope, but that it was impossible to say for certain what had caused the syncope. The judge held that the dependent had not discharged the onus of proving that the death was caused by the accident. This decision was affirmed on appeal. *Powers v. Smith* (1910), 3 B. W. C. C. 470.

Paralysis. A workman gradually acquired paralysis of his right leg through the strain of riding a heavy carrier tricycle for his employers. At the end of five years the condition incapacitated him from work. It was held that the paralysis was not a personal injury by accident, and that the workman was not entitled to compensation. *Walker v. Hockney Brothers* (1909), 2 B. W. C. C. 20.

Falling from wagon. A carman fell from his van and sustained injuries. He died three weeks later. No evidence was produced to show the connection between the accident and death, the doctor who had attended the man being abroad. It was held reversing the decision of the County Court judge that there was no evidence that the death was due to the accident. *Honor v. Painter* (1911), 4 B. W. C. C. 188.

A workman fell from a cart and was injured. He died nine days afterward. The only medical evidence called was to the effect that there was no connection between the accident and the death. The County Court judge, however, found that death was due to the accident and awarded compensation. It was held that dependent had not discharged the onus of proving that death was due to the accident. *Brown v. Kidman* (1911), 4 B. W. C. C. 199.

Traumatic pneumonia. A healthy and steady work-

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man was employed to pick up cotton waste on the decks of a ship in dock. He went to work at one o'clock and at three P. M. climbed up the ladder of the hold, apparently in great pain, and he was sent home. He received medical attention and marks were found on his ribs. Three days later he developed pneumonia from which he died. The doctor who attended him attributed the pneumonia to the injury to his sides. It was held that there was evidence that the workman had died from personal injury by accident arising out of and in the course of his employment. *Lovelady and Others v. Berrie* (1909), 2 B. W. C. C. 62.

A workman died of pneumonia. His dependents contended that the pneumonia resulted from lowered vitality caused by an accident to the workman arising out of and in the course of his employment. The only evidence that there had been an accident consisted of several inconsistent statements made by the workman, to various persons, on the day after the alleged accident, which were admitted without objection being taken. The medical referee gave a report that the pneumonia could not have been caused by the alleged accident. The County Court judge held that he was not bound to surrender his judgment to the medical referee, and held that there had been an accident causing the pneumonia, and so he awarded compensation. It was held on appeal that there was no evidence that there had been an accident arising out of and in the course of his employment. *Langley v. Reeve* (1910), 3 B. W. C. C. 175.

Mental shock or fright. The workman has been held to have suffered an injury by witnessing the effects of an accident to a fellow workman whereby nervous

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shock resulted. *Yates v. South Kirby, Featherstone & Hemsworth Collieries* (1910), 103 L. T. 170; 3 B. W. C. C. 418. In the last-mentioned case the court said: "When a man in the course of his employment goes to a place and sustains a nervous shock producing physiological injury, not a mere transient emotional impulse, it is an accident arising out of and in the course of his employment. It is something unexpected, no doubt, in this sense, that I do not suppose the man thought for a moment or knew when he was doing what was plainly his duty in going to the rescue of the other party, that it would have this physiological effect on his system. It had that effect. There was no malingering here. It was a perfectly genuine case. Mr. Simon has not suggested anything to the contrary; and I should not myself. I think this is a case which falls within the Act of Parliament on the same principle and in the same way as if the man, on going to the rescue of the other collier, was injured by this fall, or had stumbled or fallen on his way there. That, undoubtedly, would have been a case within the Act, and I can see no real difference in principle (when once you get rid of the danger of malingering), between that case and the case where a physiological injury—physiological damage—is produced by reason of what happened to this man when he went in the course of his duty to the neighboring stall, and saw what had happened to this workman." In this case a man, while at work, heard an outcry from an adjacent chamber. He found a miner severely injured and so badly wounded that he died. Subsequently the rescuer alleged that he was so affected by the appearance of peril of the miner that he was incapacitated from further employment

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and this was held to be a personal injury by accident. *Id.*

Insanity indirectly resulting from bodily injury. An accidental injury to the eyes resulting in total blindness, produced a condition of mind upon which softening of the brain supervened, causing death. It was held that death resulted from the injury. *Mitchell v. Grant & Aldcroft* (1905), 7 W. C. C. 113.

Anthrax, from handling wool. Where a workman contracted the disease of anthrax by a germ settling on his eye while sorting wool which was infected with anthrax, it was held that he had suffered injury by accident and was entitled to compensation. *Brintons, Limited, v. Turvey* (1905), A. C. 230, 7 W. C. C. 1. See also *H. P. Hood & Son v. Maryland Cas. Co.*, 206 Mass. 223; 92 N. E. 329, holding that contracting glanders from handling hides was an accident.

Acceleration or aggravation of pre-existing disease. Acceleration and aggravation of a pre-existing disease is an injury caused by accident. *Willoughby v. Great Western Ry. Co.* (1904), 6 W. C. C. 28. An injury may be caused by an accident although no injury would have been thereby suffered but for the existence of disease which was aggravated by the accident. *Lloyd v. Sugg & Co.* (1900), 81 L. T. 768; 2 W. C. C. 5. A workman, while employed in a colliery, was injured by a stone falling on his knee. The accident occurred on a cold day, and the applicant took over two hours to get to his home, a distance of a mile and a quarter. Chest trouble and pneumonia supervened, and on an application for compensation medical evidence was given that the applicant suffered from bronchitis and chronic asthma and was unable to work. It was held

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that the test to be applied was not whether the workman's diseased condition was a natural or probable result of the accident, but whether it was the result of the accident in the sense that it was occasioned by the debilitated state of the workman immediately after the accident, or whether the accident had not accelerated an existing tendency to disease, or given life to certain latent causes of disease in the workman's body. *Ystradowen Colliery Co. v. Griffiths* (1909), 100 L. T. 869; 2 B. W. C. C. 357.

"An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different, and this is so, as well when death comes through the medium of disease directly induced by the injury, as when the injury immediately interrupts the vital processes." *Freeman v. Mercantile Mut. Acc. Assn.*, 156 Mass. 351.

Inhaling poisonous gases; accelerating disease of long standing. A workman contracted the disease of enteritis from inhaling sewer gas in the course of his employment. The result was to accelerate long standing heart disease, and incapacitate the man from work before the time at which such heart disease would otherwise have incapacitated him. It was held that this was not a personal injury by accident within the meaning of the Compensation Act. *Broderick v. London County Council* (1908), 1 B. W. C. C. 219.

Gas poisoning. A caretaker of an empty house was told to lay open the drains, manholes and cesspools for inspection. He did this on several occasions in July, and becoming ill, died in the following October from

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poisoning contracted from the drains. The County Court judge found that it was not possible to specify the date when he contracted the disease. It was held that the workman had not died from a personal injury by accident within the meaning of the Act; that a disease, although arising out of and in the course of the employment is not a personal injury by accident, if it cannot be shown to have been contracted at a particular time and place. *Eke v. Sir William Hart Dyke* (1910), 3 B. W. C. C. 482. In the last-mentioned case the court reviewed a large number of decisions on the question of accidents by disease, and stated: "That a mere disease which you could not say was contracted at a particular time, and at a particular place, by a particular accident, or accidents, entitles a man to compensation." A gas fitter inhaled some coal gas, and three days later suffered from paralysis due to cerebral hemorrhage, from which he died shortly after. Seven months previously he had had a transient attack of paralysis from the same cause. On his death his widow contended that the death was due to the gas poisoning, but the County Court judge decided against her. On appeal it was held that it was a question of fact for the County Court judge to decide. *Dean v. London & North Western Railway Co.* (1910), 3 B. W. C. C. 351.

Enteritis from inhaling noxious gas. A workman engaged in the London sewers contracted the disease of enteritis from inhaling sewer gas. The Court of Appeal held that this was not a personal injury by accident. *Broderick v. London County Council* (1908), 2 K. B. 807; 1 B. W. C. C. 219. A similar decision was made in the case of *Eke v. Hart-Dyke* (1910), 2 K. B.

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677; 3 B. W. C. C. 482. In the last-mentioned case the caretaker of an empty house was told to lay open the drains, manholes and cesspools for inspection. He did this on several occasions in July, and becoming ill, died in the following October from poisoning contracted from the drains. The County Court judge found that it was not possible to specify the date when he contracted the disease. It was held that the workman had not died from personal injury by accident within the meaning of the Act.

Pneumonia from inhaling gas in mine from explosion. A miner employed in a mine died from pneumonia caused by the inhalation of gas generated by the explosion. It was held that the death was the result of the accident within the meaning of the Act. *Kelly v. Auchenlea Coal Co.* (1911), 48 Scotch L. R. 768; 4 B. W. C. C. 417.

Anæsthetic administered for purpose of operation. A workman has been held to have suffered an accidental injury where disability resulted from an anæsthetic administered for the purpose of an operation. *Shirt v. Calico Printers' Association* (1909), 2 K. B. 51; 2 B. W. C. C. 342.

Bite of animal. A workman has been held to have suffered an accidental injury by the bite or attack of an animal. *Hapelman v. Poole* (1908), 25 T. L. R. 155; 2 B. W. C. C. 48.

Lead poisoning. Lead poisoning is not an accident. *Steel v. Cammell, Laird & Co.* (1905), 7 W. C. C. 9.

Where an applicant for compensation contended that the death of the workman had been caused by lead poisoning, or its consequences, and it appeared in this particular case that the immediate cause was granular kidney, which might have been brought about by gout,

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alcoholism, heart-pressure or other complaints, it was held that the claimant did not maintain the onus of proving that the death was caused by lead poisoning. *Haylett v. Vigor & Co.* (1908), 1 B. W. C. C. 282.

An attack of colic through lead poisoning is not an accident. *Williams v. Duncan* (1898), 1 W. C. C. 123.

Opening old wound by strain; septic poisoning. A workman who had undergone an operation returned to work before the operation wound was completely healed, with instructions not to strain himself. He worked at the lever of a machine. A fellow workman, noticing that the machine was stopped, looked for the man and saw that he was talking to the foreman some yards away. It was then seen that blood was flowing freely from the operation wound and soaking into his boots. Septic poison followed, and the man died. In the absence of direct evidence as to what had happened the County Court judge drew the inference that the wound had burst open through the strain of working the lever, and awarded compensation to the dependents. It was held on appeal that there was evidence from which the County Court judge could draw this inference. *Groves v. Burroughes & Watts* (1911), 4 B. W. C. C. 185.

Germ or poison into system through break in skin. A workman has been held to have suffered an injury by a germ or poison getting into the system through a break in the skin. *Higgins v. Campbell & Harrison and Turvey v. Brintons Limited* (1904), 1 K. B. 328; 6 W. C. C. 1; the latter affirmed by the House of Lords (1905), A. C. 230; 7 W. C. C. 1.

A piece of coal digging its way under the skin of the knee of a coal miner, who very frequently has to work

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on his knees, is an accident. *Thompson v. Ashington Coal Co.* (1901), 3 W. C. C. 21.

Blood poisoning through use of a hypodermic needle is an accident. *Bailey v. Interstate Cas. Co.*, 8 App. Div. 127; 40 N. Y. Supp. 513, aff'd, 158 N. Y. 723; 53 N. E. 1123.

Poison entering through blister on finger. An injury caused to one of an imperfect physical condition while working in the ordinary way with the usual materials and appliances is not an injury by accident. Therefore, where an engine fitter was fixing steampipe joints for which purpose red lead was used, and in consequence of a blister on his finger the red lead poisoned the finger, it was held that the injury was not caused by an accident. *Walker v. Lilleshall Coal Co.* (1900), 81 L. T. 769; 2 W. C. C. 7. If a germ causes a disease without the necessity of an abrasion of the skin the general rule is that the result is a disease and not an accidental injury. *Bacon v. U. S. Mutual Accident Assn.*, 123 N. Y. 304.

Dermatitis caused by using caustic soda without gloves. Dermatitis brought on by washing out ink cans with a solution of caustic soda without the use of proper gloves is not an accident. *Cheek v. Harmsworth Bros.* (1901), 4 W. C. C. 3.

Injury to hands of dish washer by caustic soda. A workman has been held to have suffered an injury by washing crockery in hot water with soft soap and caustic soda by a man who, unknown to himself, had a peculiarly sensitive skin. *Dotzauer v. Strand Palace Hotel* (1910), 3 B. W. C. C. 387. In the last-mentioned case a scullion in a hotel was the subject of a disease affecting his skin and making it abnormally sensitive. On

the day he commenced work he washed up crockery for a number of hours in a tank containing hot water, soft soap and caustic soda. His hands became greatly inflamed, his nails came off, and he was disabled for four and a half months. The Court of Appeal of England held that this was an accident and the mere circumstance that a perfectly healthy man would not have met with it was no answer at all.

Erysipelas from wound. There was a dispute between the medical experts as to whether or not a wound in the hand on April 17th could cause erysipelas of the face on July 7th, following. The medical referee was asked the abstract question as to whether or not the diseased organisms could have been latent for so long a time. He said it was possible that the organisms might have lain dormant and subsequently sprung to life if the injured workman was in a devitalized condition. The County Court judge held that the deceased man died from personal injury by accident, and the Appellate Court held that there was no evidence to justify the finding. *Hugo v. H. W. Larkins & Co.* (1910), 3 B. W. C. C. 228.

Tight boots causing blood poisoning. Where a workman was incapacitated by reason of the pressure of a boot which had become too tight for him and that his foot became sore and blood poisoning set in, it was held that the accident did not arise out of the employment and compensation was refused. *White v. Sheepwash* (1910), 3 B. W. C. C. 382.

5. "Arising out of and in the course of the employment."

All the compensation acts have provisions to the

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effect that an employer shall be liable for an injury to an employé only when the accident arose out of and in the course of the workman's employment. Some of them express this condition in the words forming the heading of this paragraph. Others express it in different phraseology. An examination of the reports shows that this phrase has been the subject of more discussion and judicial interpretation than any other single portion of the British Compensation Act. The phrase has a double meaning. Or more properly speaking there are two conditions attached to it. The accident must "arise out of" the employment, as well as "in the course of" the employment. Thus where a workman during the course of the employment does something entirely foreign to the work which he is employed to do (playing a practical joke, for example) whereby he is injured, this accident could be said to have occurred "during the course of" the employment, but it could not be said to arise "out of" the employment because the workman was not doing anything which he was employed to do when the accident happened. Several variations of this condition will be found in the pages following in this subdivision. The questions of when a man's work begins and when it terminates for the purpose of awarding compensation for injuries have also been the subject of much discussion. As a general proposition the time while a man is going to and from his work is no part of his employment. But there are enough exceptions to this principle to make it a pregnant source of controversy, as the cases cited hereafter in this subdivision will demonstrate. The other subjects will be found under their appropriate topical headings, indicated by words in *italics*.

The expression "in the course of the employment" points to the time, place and circumstances under which the accident takes place; it occurs in the course of employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time. *Fitzgerald v. Clarke & Son* (1908), 2 K. B. 796; 1 B. W. C. C. 197; *Moore v. Manchester Liners* (1910), A. C. 498; 3 B. W. C. C. 527. In the last-mentioned case a fireman on board a steamship lying off South Brooklyn went on shore for the purpose of obtaining for himself certain necessities which were not provided by the owners of the ship. On returning to the ship he fell off a ladder, which was the only means of access from the dock to the ship, and was drowned. It was held by the House of Lords that the accident arose out of and in the course of the fireman's employment and therefore that the widow was entitled to compensation.

"The only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and * * * the court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be." *Hoddinott v. Newton Chambers & Co.* (1900), 3 W. C. C. 74.

Going to and from place of employment. As a general rule a man's employment does not begin until he has reached the place where he has to work, or the scene of his duty, and it does not continue after he has left. The periods of going and returning are generally excluded. *Benson v. Lancashire and Yorkshire Rail. Co.*

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(1904), 1 K. B. 242; 6 W. C. C. 20; *Jackson v. General Steam Fishing Co.* (1909), A. C. 523; 2 B. W. C. C. 56; *Walters v. Staveley Coal & Iron Co.* (1911), 105 L. T. 119; 4 B. W. C. C. 303; *Gilmour v. Dorman, Long & Co.* (1911), 105 L. T. 54; 4 B. W. C. C. 279.

In the case of *Jackson v. General Steam Fishing Co.* (1909), A. C. 523; 2 B. W. C. C. 56, a workman was employed to watch trawlers as they lay in a harbor. He was on duty for twenty-five hours, during which time he had to provide his own food, and in connection with his duties it was occasionally necessary for him to be on the quay to which the trawlers were moored. In the course of his watch he left the boats and went to a hotel near at hand for some refreshment. He was absent a very short time, had returned to the quay, and while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. It was held by the House of Lords that the accident arose out of and in the course of the man's employment and that he was entitled to compensation.

In the case of *Walters v. Staveley Coal Co.* (1911), 105 L. T. 119; 4 B. W. C. C. 303, a miner, proceeding to his work along a footpath prepared by the employers for the workmen's convenience, slipped on some steps at a point about a mile away from the place of employment. There was evidence that the employers knew the steps were not safe. It was held that the accident did not arise in the course of the employment. In the last-mentioned case, Lord SHAW, in a concurring opinion said: "In this case there was a circuitous public road, and there was a short cut from one part of that public road to another. It was optional to the workman to

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take the short cut or not to take it. Only when the point was reached where the short cut was at an end the workman had gone either by it or by the circuitous public road, and not till then, did he reach the place which was the place of his employment. There was no contract or obligation, direct or indirect, on his part, that he should use the short cut or the steps conveniently provided there. He might reach the place of his employment in any manner he liked. It was not arising out of his employment and not in the course of his employment that he met with his accident. My Lords, I fear to make any general proposition in these cases when I see the use that is made by ingenious and able counsel of propositions laid down in this or any other court. I would venture, however, to say one philosophical thing, which is that analogies in matters of fact nearly always fail, and I think it is a dangerous thing in the sphere of law to conjure out of analogies a principle or proposition arising upon judicial dicta which are in any respect in conflict, or to be cited as in conflict, with the clear propositions and text of a modern statute."

An accident which occurs when a man is passing along a public highway on his way to the place where he works, is not one arising out of and in the course of his employment. *Holness v. Mackay & Davis* (1899), 80 L. T. 831; 1 W. C. C. 13. A man who was employed as a shepherd was on his way to the place where he was to be employed, in a wagon furnished by his employer, and when at a distance of forty yards from the cottage which he was to occupy the wagon was suddenly jerked and the shepherd thrown off, receiving injuries which proved fatal. It was held that the injury did not arise

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out of and in the course of the employment, as the employment had not commenced. *Whitbread v. Arnold* (1908), 99 L. T. 103; 1 B. W. C. C. 317. In the case of *Gilmour v. Dorman, Long & Co.* (1911), 105 L. T. 54; 4 B. W. C. C. 279, a workman was accustomed to go to his work by a footpath which ran over vacant land belonging to his employers, and afterwards along a railway line, to the factory where he was employed. While on his way to work he was injured by slipping on some ice on the vacant land, a quarter of a mile from the place where he had to work. It was held by the Court of Appeal in England that the accident did not arise in the course of his employment. Although no hard and fast rule can be laid down on the subject it may generally be supposed that so long as the workman is lawfully upon premises under the control of his employers, so that a duty exists in respect thereof from them to him, his employment will continue. Thus, it has been held that where a workman is injured on the ground floor of the factory of his employer while going to his work on an upper floor, that this is in the course of his employment and he is entitled to compensation. *Holness v. Mackay & Davis* (1899), 80 L. T. 831; 1 W. C. C. 13. A workman had to come to the place of his work by a train arriving twenty minutes before work actually commenced, and it was their practice, recognized by the employers, to deposit their tickets on the ledge of the office pigeonhole, and then, if so minded, to breakfast at a mess cabin provided by the employers. A workman, while depositing his ticket, was injured by falling into an excavation. It was held that he was entitled to compensation. *Sharp v. Johnson & Co.* (1905), 92 L. T. 675; 7 W. C. C. 28. A miner was

injured on his way to work. He was on his employers' land but had not reached the point at which his duties commenced, and the accident happened twenty minutes before the hour at which work started. The arbitrator decided that the accident did not arise out of and in the course of the employment, and it was held by the Court of Session of Scotland that there was evidence on which the arbitrator was justified in so deciding. *Anderson v. Fife Coal Co.* (1909), 47 Scotch L. R. 5; 3 B. W. C. C. 539. A miner descended into his pit by the cage and got out at the wrong level. He then descended by a shaft near the cage, and instead of proceeding to his work, he walked to a place some 700 feet along a road, which by its nature was very different from his proper road. At this point he was found dead, having been scalded to death by the steam which escaped from the colliery engines. There was no evidence to show why he went there. It was held that the accident arose out of and in the course of the employment. *Sneddon and others v. Greenfield Coal and Brick Co.* (1910), 47 Scotch L. R. 337; 3 B. W. C. C. 557. A collier was injured by a gate swinging back on him. The land on both sides of the gates belonged to his employers and the gates were about 150 yards from the lamp-room to which the collier was first going on his way to work. On a claim for compensation the County Court judge held that the workman was entitled to compensation and that the accident arose out of and in the course of the employment. It was held on appeal that there was evidence to support this finding. *Hoskins v. J. Lancaster* (1910), 3 B. W. C. C. 476. A miner's employment has commenced when he has obtained his pit lamp and his tallies and is waiting at

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the pit brow to descend. *Fitzpatrick v. Hindley Field Colliery Co.* (1901), 3 W. C. C. 37; 4 W. C. C. 7. Where an engine driver arrived on the premises where he was to start work an hour and a quarter before it was necessary for him to be there and in crossing some tracks in returning from a place where he had gone for his own purposes was hit by a train and killed, it was held that the accident did not arise out of the employment. *Benson v. Lancashire & Yorkshire Ry. Co.* (1903), 89 L. T. 715; 6 W. C. C. 20. When an employ  arrives at the place of work shortly before the regular time to begin work and is doing anything relating to the employment and is injured, he is entitled to compensation. *Sharp v. Johnson & Co.* (1905), 92 L. T. 675; 7 W. C. C. 28.

A workman was engaged to load a van, and was promised employment in unloading it at another place if he would be there by the time the van arrived. He agreed to be there, and started on his bicycle, but on the way met with an accident. The County Court judge held that the employment was continuous and awarded compensation. On appeal it was held that there were two separate and distinct employments; one had ended and the other had not begun. The accident, therefore, did not arise out of and in the course of the employment. *Perry v. The Anglo-American Decorating Co.* (1910), 3 B. W. C. C. 310.

The employment of a workman is not limited to the moment when he reaches the place where he is to begin work, and to the moment when he ceases that work. Where, therefore, a workman, when his work for the day was over, without loitering, and with all reasonable speed, left the place where he was working by the

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accustomed and permitted route on the way to his home, and was injured while so doing, it was held that the accident arose in the course of the man's employment and he was entitled to compensation. *Gane v. Norton Hill Colliery Company* (1909), 100 L. T. 979; 2 B. W. C. C. 42. In the last-mentioned case the injured workman was on his way home, after having completed his day's work. There were three ways he could go over the defendant's premises. No directions were given to the man as to which way he should or should not go. The shortest way and the one used by most of the men was over certain parts of the employer's premises, through a doorway, down some steps and across some railway lines, which were on the premises and under the control of the employers. In going in this way the workman was passing under some trucks which had just been safely passed under by other workmen going in the same direction, and while doing so the trucks moved, passing over his legs and crushing both of them, requiring their amputation. It was held that the accident arose out of and in the course of the workman's employment, and that he was entitled to compensation. In the last-mentioned case the court said that it did not wish to lend any color to the suggestion that a workman is entitled to the protection of the act during the whole period necessary to get to his own home from the place where he is employed. But under the peculiar circumstances of that case, it was held that the workman was entitled to compensation.

A miner who was making his way home from the pit, instead of taking the recognized exit provided by the mine owners for the use of their man, crossed a gangway on to a dirt bin or waste heap, down which he pro-

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ceeded by a steep and rough, and in wet weather very slippery track, not formed in any way but worn down into uneven steps. Near the foot of the slope and while still on his employers' premises, he slipped and fell and was fatally injured. The use of this route was neither sanctioned nor expressly prohibited by the owners of the mine, and involved, as the deceased must have known, considerable danger. On these facts it was held that there was evidence to support the arbitrators' ruling that the accident did not arise out of and in the course of his employment. *Hendry v. The United Collieries* (1910), 47 Scotch L. R. 635; 3 B. W. C. C. 567. "While the workman is leaving the place where he is employed, I think that, for the purposes of this Act, his employment would continue. But though his employment may continue for an interval after he has actually ceased working, yet there must come a time when he can no longer be said to be engaged in his employment in such a way that an accident happening to him can be said to have arisen out of and in the course of his employment. There must be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn in each case is a question of fact." *Smith v. South Normanston Colliery Co.* (1903), 1 K. B. 204; 5 W. C. C. 14. Where a workman was killed on his employer's premises while leaving them by a short cut which he had never used before, but which other men were in the habit of using, it was held that his dependents were entitled to compensation. *McKee v. Great Northern Railway Co.* (1908), 42 Irish L. T. 132; 1 B. W. C. C. 165. A fireman in the service of a railway company was traveling to his home on one of the company's trains after he had

finished his work, as he had a right to do, and he was last seen with a basket in his hands and his face towards the door; a crash was heard and he disappeared. He was injured so badly that he died. It was held that there was evidence that the accident arose out of and in the course of his employment. *Pomfret v. Lancashire & Yorkshire Ry. Co.* (1903), 89 L. T. 000; 5 W. C. C. 22. Where a workman, having finished his day's work, was walking home along a private branch railway leading from his employer's colliery to the main line of a railway company, and was knocked down by an engine of his employers 230 yards from the place where he had been working, it was held that he was not entitled to compensation. *Caton v. Summerlee & Mossend Iron Co.* (1902), 39 Scotch L. R. 762. Where the employer contracts, either expressly or impliedly, to provide free carriage by train for the workman to his place of employment, the employment will be held to begin when the workman enters the train, and therefore in case of an accident, the workman is entitled to compensation. *Holmes v. G. N. Rail. Co.* (1900), 2 Q. B. 409; 2 W. C. C. 19. In such a case the employment may even begin or continue while the workman is waiting on the platform for the train so provided. *Cremins v. Guest, Keen and Nettlefold* (1908), 1 K. B. 469; 1 B. W. C. C. 160. Where the giving to the workman by the employer of a return railway ticket was merely a gratuitous concession by the employer and the workman was in no way obligated to go or return from work on the train, it was held that an accident while the workman was on the way to the place of employment, but before he reached the same, did not arise out of and in the course of the employment. *Nolan v. Porter & Sons* (1909), 2 B. W.

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C. C. 106. Where the employer furnished a train to carry the workmen to and from their work, but did not require that they should ride on this train, it was held that a workman about to enter the train who was pushed off the platform and was killed during the rush of workmen, had suffered an accident while the relation of master and servant existed, and that his widow as a dependent was entitled to recover compensation. *Cremins v. Guest, Keen & Nettlefold* (1907), 1 B. W. C.

C. 160. A colliery company provided a train on their railway to take the workmen from the colliery to their homes. A collier on reaching the point nearest his home, three-quarters of a mile from the colliery, met with an accident, while alighting from the train. It was held that the accident did not arise out of and in the course of the employment. *Davies v. Rhymney Iron Co.*, 2 W. C. C. 22. An engine cleaner who lived at King's Cross, was carried free by his employers, a railway company, to Hornsey. While crossing the tracks for the purpose of getting to the place where he worked, and shortly before the time for commencing work, he was knocked down by a passing train and killed. It was held that the employment commenced when he entered the train at King's Cross and that the accident arose out of and in the course of his employment. *Holmes v. Great Northern Ry. Co.*, 2 W. C. C. 19. A workman employed by a farmer, returning home temporarily during a storm, was injured while crossing a plank laid over a dyke, and it was held that the accident arose out of and in the course of his employment. *Taylor v. Jones* (1907), 1 B. W. C. C. 3.

A fruit picker on piecework was told to stop what she was doing and go to work at another part of the farm.

While proceeding as instructed she met with an accident and it was held that it arose out of the employment. *Jesson v. Bath* (1902), 4 W. C. C. 9.

A club servant left the club for his own purposes, returning about midnight by climbing through a window, and while so doing he was injured. It was held that the accident did not arise out of and in the course of his employment. *Watson v. Sherwood* (1909), 2 B. W. C. C. 462.

A workman employed by colliery owners went home to dinner in the middle of the day by the accustomed and permitted route, which was on the land of his employers; being overtaken by a line of cars conveying rubbish to a tip, he attempted to jump on to one of the cars, fell, was run over and killed. In attempting to jump on one of the cars he was transgressing one of the regulations of the colliery. It was held that the accident did not arise out of and in the course of his employment. *Pope v. Hill's Plymouth Co.* (1910), 102 L. T. 633; 3 B. W. C. C. 339.

Getting on and off vessels. A seaman, when off duty, left his vessel on his own business. The vessel was then alongside the quay, but on his return, two hours afterward, it was some five or six feet from the pier, the top of the rail being about three feet lower than the quay. The vessel had no gangway, but a ladder was used for getting on board. On his arrival at the pier, the seaman, seeing no ladder, hailed, and, having got no answer, he jumped from the pier to the vessel, with the result that his leg struck against the rail, and he was permanently injured. It was held that the accident arose out of and in the course of the employment. *Kearon v. Kearon* (1911), 45 Irish L. T. 96; 4 B. W. C. C. 435.

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The workman, a riveter working on a ship in dock, was about to go ashore for his breakfast. When he came on deck he found the vessel was being removed to a dry dock, and was already a short distance from the quay. The gangway had been removed, and there was no other means of getting ashore than by slipping down a rope which still held the vessel to the quay. By means of this rope a fellow workman got ashore safely, and the applicant attempted to follow him. The rope gave way, and he was thrown against the quay wall and injured. It was held by the Court of Appeal that there was evidence to support the finding of the County Court judge that the accident arose out of and in the course of the man's employment. *Keyser v. Burdick & Co.* (1910), 4 B. W. C. C. 87. The deceased was a seaman on board a steamship and had gone ashore with leave for purposes of his own. The ship was moored to another vessel, which was made fast to the quay, so that, in order to board his own ship, the deceased had first to cross the deck of the other vessel. There was evidence that the deceased, on his return, safely boarded the other vessel, and got on to the gangway between the two ships. The gangway, however, gave way, and he fell into the water and was drowned. It was held that the deceased met his death by an accident arising out of and in the course of his employment. *Leach v. Oakley, Street & Co.* (1910), 4 B. W. C. C. 91. A workman was employed to watch trawlers as they lay in a harbor. He was on duty for twenty-five hours, during which time he had to provide his own food, and in connection with his duties it was occasionally necessary for him to be on the quay to which the trawlers were moored. In the course of his watch he left the boats

and went to a hotel near at hand for some refreshments. He was absent a very short time, had returned to the quay, and while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. The arbitrator found that the accident to the deceased arose out of and in the course of his employment within the meaning of the Act of 1906. It was held by the House of Lords that there was evidence upon which the arbitrator could so find. *Jackson v. General Steam Fishing Co.* (1909), A. C. 523; 101 L. T. 401; 2 B. W. C. C. 56. A fireman on board a steamship lying off South Brooklyn, went on shore for the purpose of obtaining for himself certain necessaries which were not provided by the owners of the ship. On returning to the ship he fell off a ladder which was the only means of access from the quay to the ship and was drowned. It was held by the House of Lords that the accident arose out of and in the course of the man's employment and that therefore his widow was entitled to compensation. *Moore v. Manchester Liners* (1908), 3 B. W. C. C. 527, rev'g 1 K. B. 417; 2 B. W. C. C. 87. A seaman in returning to his ship passed over a gangway from the wharf, and had one foot on the rail of the ship and the other on a ladder leading from the rail to the deck, when he overbalanced and fell over the side of the ship and was drowned. It was held that the accident arose out of and in the course of the workman's employment. *Canavan v. Owners of the Steamship "Universal"* (1910), 3 B. W. C. C. 355. A steward of a steamship discharging at the port of Montreal, Canada, went on shore in the evening as he was permitted to do. Returning late in the evening to his ship, as was alleged, in a state of intoxication

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or semi-intoxication, he attempted to board the ship by using the cargo skid or stage, instead of the gangway. In doing so he slipped and fell and received injuries from the effect of which he died. It was held that the injury arose out of and in the course of the employment. *Robertson v. Allan Brothers & Co.* (1908), 98 L. T. 821; 1 B. W. C. C. 172. When a ship was lying in Glasgow harbor a seaman went ashore without leave and returned to his ship later in the evening in a state of intoxication. He went to his bunk and was found next morning lying injured at the bottom of the hold of the ship and from these injuries he subsequently died. There was no evidence as to how the man got to the place where he was injured. To reach the place it was necessary for him to pass through a door which was broken or forced open, by whom there was no evidence to show. It was held that there was no evidence that the accident arose out of the employment. *O'Brien v. Star Line* (1908), 45 Scotch L. T. 935; 1 B. W. C. C. 177.

A workman engaged upon a ship, working overtime, went ashore between 9.30 and 10 A. M. to buy some bread. He was told by the foreman not to go, and could previously, during the interval allowed for tea, have procured the bread. Upon his return, while attempting to jump from the quay to the ship, he fell and was killed. It was held that the accident did not arise out of and in the course of the employment. *Martin v. Fullerton & Co.* (1908), 45 Scotch L. R. 812; 1 B. W. C. C. 168. The second engineer of a steam trawler which was in dry dock at the time, went ashore to his home for dinner. As he returned to the ship he fell into a dry dock and was killed. It was held that the accident did not arise out of and in the course of the engineer's em-

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ployment. *Gilbert v. Owners of the "Nizam"* (1910), 3 B. W. C. C. 455. In the last-mentioned case the court said: "I decline to assent to the view that a ship is in a different position from a factory for this purpose. This is a simple case where a man has been to his own home to get his dinner, and has met with an accident on his way back to the scene of his labors. That question has been raised and decided against the workman, not once, but again and again by this court."

The captain of a vessel left his ship in Bangor Roads and went to a hotel a hundred yards away from the dock. He returned to the dock at about 11 P. M. and hailed his ship for a boat. He was not heard from for some time, but eventually a boat put off. Before the boat reached him he fell over the dock side and was drowned. The evidence was consistent with his going to the hotel for his own pleasure, or in the course of his employment. It was held that the dependents had not discharged the onus of proving that the accident arose out of and in the course of the employment. *Hewitt and Others v. Owners of the Ship "Duchess"* (1910), 102 L. T. 204; 3 B. W. C. C. 239. "The workman, who was a sailor, left his ship and went for a week-end to his son's house, which was some considerable way down the river at Poplar. He took his dinner and tea there and he slept there. On the Monday morning he started to rejoin his vessel. On his way he slipped on some steps at the riverside, and injured himself. We certainly cannot go the length of saying that this was an accident arising out of and in the course of this man's employment. The case would be exactly the same if he had slipped on the pavement in the street before he came to the steps. We have pointed out not once or twice but

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often that, save in certain exceptional circumstances, the Act does not extend to and protect the workman when on his way from his house to his employment. Still less does it protect him when out for his own pleasure for a week-end." It was held therefore that the accident did not arise out of and in the course of the employer's employment. *Kelly v. Owners of the "Foam Queen"* (1910), 3 B. W. C. C. 113. Where an employer gave to an employé a railway ticket and ordered him to report on board ship for work at 7 A. M., and while the workman was on his way to the ship he fell off the dock and was injured, which dock was not under the control of his employer, it was held that the giving of the railway ticket was merely a gratuitous concession by the employers and that it was in no way obligatory on the workman to go or return from his work by train as provided in the ticket, and that therefore the accident did not arise out of and in the course of the man's employment. *Nolan v. Porter and Sons* (1909), 2 B. W. C. C. 106. A steward on a steamship had gone ashore with leave. At about 10 P. M. he was passed onto the wharf by the doorkeeper who saw him make his way toward the ship. He was not seen boarding the gangway, nor was there any evidence that he ever reached it, but the watchman heard a splash in the water and a cry of "Man overboard." When the body was recovered life was extinct. It was held that the applicant for compensation had not discharged the onus of proving that the accident arose out of and in the course of the man's employment. *Kitchenham v. Owners of S. S. "Johannesburg"* (1910), 4 B. W. C. C. 91, affirmed by the House of Lords, 4 B. W. C. C. 311. A workman was descending the side of a ship by a rope

ladder. The ladder twisted suddenly, he gave a cry, and then fell into the water. He was dead when picked up. The medical evidence was that death was due to heart failure and not to drowning and that the heart was in such a state that any slight exertion might have caused failure. The County Court judge found that death was due to accident arising out of and in the course of the employment, and awarded compensation. It was held on appeal that there was evidence to support the finding. *Trodden v. J. McLennard & Sons* (1911), 4 B. W. C. C. 190. A captain left his ship and went to a hotel 100 yards from the quay. He returned to the quay and hailed his ship for a boat. After some time, a boat put off, but before it reached the quay the captain fell into the water and was drowned. The evidence was equally consistent with his having gone ashore for his own purposes or for purposes connected with his duties. It was held by the House of Lords that the accident did not arise out of and in the course of the employment. *Fletcher v. Owners of Steamship "Duchess"* (1911), 4 B. W. C. C. 317. A sailor, returning on board his ship after a trip on shore, not connected with his employment, fell into the water from steps leading from the gangway, of which they formed part, and was drowned. It was held that this was not an accident arising out of and in the course of the employment. *Hyndman v. Craig & Co.* (1910), 44 Irish L. T. 11; 4 B. W. C. C. 438.

A seaman while returning on board ship from the shore, when the ship was lying in port, slipped on the gangway and fell over the gangway ropes, striking his head in falling, and received injuries which proved fatal. There was no evidence to show why the de-

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ceased had gone there, whether on the service of the ship or for his own purposes, or with or without permission. It was held that the evidence being equally consistent that the deceased was or was not on the ship's business, the applicant for compensation had not discharged the onus resting upon her of showing that the injury arose out of and in the course of the employment. *McDonald v. Owners of Steamship "Banana"* (1908), 1 B. W. C. C. 185.

Injuries at mealtime. A workman when employed during the night shift took his supper for the sake of warmth seated on a tank in the pump room. His employers provided a dining room for their workmen, but they were not bound to take their meals there. In getting off the tank the workman fell through a hole in the tank, was scalded and received injuries from which he died. The workman was not expressly prohibited from going on to the tank, but the evidence was that he had no right to be there, and if found there he would have been dismissed. It was held that the accident did not arise out of the workman's employment. *Brice v. Edward Lloyd* (1909), 2 K. B. 804; 2 B. W. C. C. 26. The court distinguished the case of *Blovelt v. Sawyer* (1904), 1 K. B. 271; 6 W. C. C. 16. In the last mentioned case the accident happened to a bricklayer during the dinner hour. It appeared that there was no absolute rule as to the workmen going or staying in the building during the dinner hour, so that they were at liberty to stay there and eat their dinner if they so desired. At the dinner hour the workman employed on the building under course of erection remained in the building and sat down under a wall to eat his dinner. The wall fell on him while he was sitting there and caused

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the injury for which he claimed compensation. It was held that he was entitled to compensation, as the accident arose out of and in the course of the man's employment.

Where, by an arrangement between a railway company and certain employés, they were allowed to go to a cabin on the railway company's premises for certain meals, and one of such employés was returning from the cabin after having a meal there, and was knocked down by a car which was being shunted on one of the company's tracks, it was held that the injury arose out of and in the course of the employment. *Earnshaw v. Lancashire & Yorkshire Ry. Co.* (1903), 5 W. C. C. 28.

A night watchman who left his box and went into a shanty where tools were kept to cook and eat his food and was injured by the falling of the shanty was held to have been injured by accident arising out of and in the course of his employment. *Morris v. Lambeth Borough Council* (1905), 8 W. C. C. 1.

Relieving nature. During the dinner hour a man met with an accident when returning from a place where he had gone to relieve nature and it was held that the accident arose out of and in the course of the employment. *Elliott v. Rex* (1904), 6 W. C. C. 27. In the last-mentioned case the court refused to follow the decision in the case of *Pearce v. London & South Western Ry. Co.* (1899), 2 W. C. C. 152, where it was held that when a man was injured when going to relieve nature during the breakfast hour that the accident did not arise out of the employment.

A workman instead of going to the proper place for a necessary purpose went into a confined space underneath a table engine and stepped into boiling water in

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a cistern which was sunk into the ground to receive the escaping hot water from the engine. It was held that the accident did not arise out of and in the course of employment. *Thomson v. Flemington Coal Co.* (1911), 48 Scotch L. R. 740; 4 B. W. C. C. 406.

Doing forbidden acts. A brusher in a mine, who had finished his work for the day, jumped on to a hutch in order to ride to the pit bottom. On the way he was knocked off the hutch by his head coming into contact with two crowns which were below the ordinary pit level, and was injured. A special rule, of which the injured man was cognizant, forbade miners from riding on the hutches. It was held that the accident did not arise out of the employment. *Kane v. Merry & Cunningham* (1911), 48 Scotch L. R. 430; 4 B. W. C. C. 379. A workman who is injured while doing something which he has been absolutely forbidden to do cannot be said to be injured while in the course of his employment. *Whitehead v. Reader* (1901), 3 W. C. C. 40. The rules of a pit provided that explosives capable only of being fired by detonators should be used; that the detonators should be securely kept and issued only to shot-firers; and that every shot should be fired by a competent person appointed in writing to perform the duty. On the occasion in question, after the shot-firer had left the pit, a miner, who had a detonator in his possession which, however, he had not received from the shot-firer, started to fire a shot. This was not his duty, and was in direct opposition to orders. In the course of the operation an explosion occurred whereby he was killed. It was held that the accident did not arise out of and in the course of the employment. *Kerr v. William Baird & Co.* (1911), 48 Scotch L. R. 646; 4

B. W. C. C. 397. A message boy, who was employed in delivering fish at a kitchen situated on the third floor of an infirmary, was injured while making his way from the ground floor by means of a hoist. There was a notice at the side of the hoist to the effect that it was only to be used by servants of the institution, and worked only by those specially authorized by the directors, but it was not proved that the boy had read the notice, or had his attention directed to it, though it was proved that he had been cautioned against using the hoist. It was held that the accident did not arise out of and in the course of his employment. *M'Daid v. Steel* (1911), 48 Scotch L. R. 765; 4 B. W. C. C. 412.

A miner was warned by a fireman not to remain at work at a certain place, as blasting operations were about to commence. He left the place and went to work at some distance away. Here he remained at least an hour. Blasting operations commenced, and subsequently the workman was found dead among the debris. There was no evidence as to how he got there. The arbitrator found that the injury did not arise in the course of his employment. It was held that there was evidence to support the finding. *Traynor v. Robert Addie & Sons* (1910), 48 Scotch L. R. 820; 4 B. W. C. C. 357.

A workman was employed as a "damper" in a colliery. He worked some distance away from the pitshaft, and on the day of the accident he, with others, got into an empty tub on an endless rope, to ride to the spot where they were working. This method of transit was expressly forbidden, and fines were inflicted for disobedience, but the rule was habitually disregarded. On the journey the deceased raised his head above the level of the tub, and became pinned between the roof

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and truck, receiving injuries which proved fatal. It was held by the Court of Appeal that the accident did not arise out of the workman's employment. *Barnes v. The Nunnery Colliery Co.* (1910), 4 B. W. C. C. 43. A workman in a power house dusted the switchboard. It was no part of his duty, and he was expressly forbidden to do so. In doing this he fell against the live gear, and sustained injuries. It was held that the accident did not arise out of the employment. *Jenkinson v. Harrison Ainslie & Co.* (1911), 4 B. W. C. C. 194. A boy was employed to hand balls of clay in molds to a molder, and was told not to touch the machinery. Having nothing to do for the moment, he attempted to clean the machinery and was thereby injured. It was held that the accident did not arise out of and in the course of the employment. *Lowe v. Pearson* (1899), 79 L. T. 654; 1 W. C. C. 5.

A workman employed in a coal mine as a drawer, was working in a level from which an "upset" was being driven. On the day of the accident the fireman discovered an outbreak of gas in the "upset," and accordingly placed a board across the entrance, chalking upon it, "No road up here." Such a board or fence was the usual mode of warning persons that it was dangerous to enter the place so fenced. The workman understood what the putting up of the board meant, and that it was dangerous to work in the "upset." He required a pick, and knowing that one had been left in the upset, he went to get it and passed over or under the fence with a naked light in his cap. An explosion took place and he was killed. It was held that the accident arose out of the employment. *Conway and another v. Pumpherston Oil Co.* (1911), 48 Scotch L. R. 632; 4

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B. W. C. C. 392. The court followed the case of *Whitehead v. Reader* (1901), 2 K. B. 48, where the following rule is laid down: "I agree in what has already been pointed out, that it is not every breach of a master's orders that would have the effect of terminating the servant's employment so as to excuse the master from the consequences of the breach of his orders. We have to get back to the orders emanating from the master to see what is the sphere of employment of the workman, and it must be competent to the master to limit that sphere. If the servant acting within the sphere of his employment violates the order of his master, the latter is responsible. It is, however, obvious that a workman cannot travel out of the sphere of his employment without the order of his employer to do so; and if he does travel out of the sphere of his employment without such an order, his acts do not make the master liable either to the workman under the Workmen's Compensation Act, 1897, or to third persons at common law."

A collier was sent to drill a hole from above into a seam, in order to draw off gases and render the seam safe. The seam itself was marked off as forbidden meanwhile. The man asked if he might go into the seam to see if the drill was running straight, and was told that he must not. He, nevertheless, went and was suffocated. It was held that there was evidence to support the finding of the County Court judge, that the accident arose out of and in the course of the employment. *Harding v. Brynddu Colliery Co.* (1911), 2 K. B. 747; 4 B. W. C. C. 269.

Doing acts for which the workman is not employed. A boy employed in a spinning mill injured himself while

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cleaning machinery in motion. The judge found, as a fact, that he was not employed to clean the machinery. It was held that the accident did not arise out of the employment. *Naylor v. Musgrave Spinning Co.* (1911), 4 B. W. C. C. 286. A workwoman, employed solely to work one machine, scratched her hand on a machine of another sort. It was not explained how she came to be at the other machine. Blood poisoning followed, and she died. It was held that the County Court judge was not justified in inferring that the accident arose out of the employment. *Cronin v. Silver* (1911), 4 B. W. C. C. 221. An engine driver left his engine when it was standing at rest, and crossed the line in order to communicate with the fireman of another engine on business of his own not in any way concerning his work or his employers. On his way back to his engine he was knocked down by a truck and was killed. It was held that the accident did not arise out of or in the course of the man's employment within § 1 (1) of the Act of 1897. (House of Lords), *Reed v. Great Western Ry. Co.* (1908), 99 L. T. 781; 2 B. W. C. C. 109. A workman going home to dinner through his employers' docks, attempted to climb on a car of a railway which traversed a portion of the docks, and in doing so he fell and received permanent injuries. The arbitrator found that he did not attempt to climb on the car for any object of his employers, but for his own pleasure, and it was held that the accident did not arise out of the employment. *Morrison v. Clyde Navigation Trustees* (1908), 46 Scotch L. R. 38; 2 B. W. C. C. 99. A domestic servant, who was outside the door of her employer's house drying her hair, returned in response to an order, to the house to take charge of a baby in a

cradle within a couple of feet of the fire. She continued the operation of drying her hair; her sleeve was loose and caught fire and from the injuries she died. No one witnessed the accident, but according to a statement made by the girl herself after the happening of the occurrence, her clothes caught fire while she was drying her hair. It was held that the accident did not arise out of and in the course of her employment. *Clifford v. Joy* (1909), 43 Irish L. T. 193; 2 B. W. C. C. 32. Where a customer in a hotel went into the kitchen, where he had no business to be and made a rush at the cook, who, in trying to avoid him, put her arm through a glass door and was seriously hurt, it was held that this was not an accident to the cook arising out of the employment. *Murphy v. Berwick* (1909), 43 Irish L. T. 126; 2 B. W. C. C. 103. A boy who had charge of the handle of a machine, lifted off the cover over some pinion wheels and played with them, with the result that his hand was caught in the wheels and the end of one of his fingers was torn off. He had orders not to lift the cover or touch the pinion wheels. It was held that the accident did not arise out of and in the course of the employment. *Furniss v. Gartside & Co.* (1910), 3 B. W. C. C. 411. A stoker on a locomotive engine received by mistake the wages of another man. He left his engine and went over to an engine on which the other man was working, in order to give him these wages. This engine was traveling about five miles an hour. The workman attempted to board the engine by grasping the rails at the side of the doorway, missed the step and sustained personal injuries by the wheels of the engine passing over his foot. It was held that the attempt to board the engine while in motion was ob-

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viously dangerous and wholly unnecessary, and that the accident did not arise out of and in the course of the employment. *Williams v. The Wigan Coal and Iron Co.* (1909), 3 B. W. C. C. 65. A workman sent on an errand loitered on the way back and wasted time with friends, so that he took two hours to go about a half a mile, at the end of which he suffered an accident, and it was held that it did not arise out of and in the course of the employment. *Bates v. Davies' Executors* (1909), 2 B. W. C. C. 459. A laborer in a mine was, without instructions, acting as a collier and was injured, and it was held that the accident did not arise out of and in the course of his employment. *Edwards v. International Coal Co.* (1899), 5 W. C. C. 21. A girl, eighteen years of age, acting as she thought in her master's interest, left her work to start an engine, which was in charge of a person who was not present. Several of her companions warned her that she ought not to touch it. She was injured in starting the engine, and it was held that the accident did not arise out of and in the course of the employment. *Losh v. Evans & Co.* (1902), 5 W. C. C. 17. An accident which occurs to a workman while doing something for his own pleasure, foreign to his duty and his employer's interest, does not arise out of and in the course of the employment. *Smith and another v. The Lancashire & Yorkshire Ry. Co.* (1899), 79 L. T. 633; 1 W. C. C. 1.

Where two boys were employed in threshing, they exchanged positions with the knowledge of the foreman in charge, and one of them was injured. It was held that such injury occurred during the course of the boy's employment. *Cambrook v. George* (1903), 5 W. C. C. 26.

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Obeying orders which workman is not bound to obey. An accident which occurs while a man is complying with an order which, although he knows or ought to know he need not obey, because it is against the rules, but which is given to him by one from whom he received his orders, may, nevertheless, be an accident arising out of and in the course of the employment. *Statham v. Galloways Limited*, 2 W. C. C. 149.

Acting on orders supposed to be authoritative. A boy thirteen years of age, whose duty was to do all sorts of things under the direction of a foreman, was untruthfully told by another man that the foreman said he was to do certain work, and the boy did it, in the course of which he was injured, and it was held that the accident arose out of and in the course of his employment. *Brown v. Scott* (1899), 1 W. C. C. 11.

Acting on an emergency. A boy was employed to grease the wheels and axles of railway trucks. While waiting for trucks to come up he thought the switch was against the engine, and began to pull the lever in order to open it and was injured. It was held that there was evidence of an accident arising out of and in the course of his employment. *Harrison v. Whitaker Bros.*, 2 W. C. C. 12.

A workman was employed by a lion tamer to look after the baggage, clean out lion cages, and generally make himself useful, but it was no part of his duty to feed lions. One afternoon the workman was left in sole charge of the cages of lions, with orders to see that no harm came to them or anyone else by reason of their fierceness. One of the lions got out of a cage and into a dressing room, but there was no evidence to show how it happened. The workman went into the dressing

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room and tried to drive the lion back into the cage, when the lion turned on him and killed him. In a claim by the dependents against the employer under the Compensation Act of 1906, the County Court judge dismissed the claim, being of the opinion that the facts were consistent only with the deceased having interfered with the lion for some purpose of his own, there being no evidence to support the theory that the lions had fought or that the deceased had acted on an emergency. It was held on appeal, however, that as the deceased had been left in charge, it was his duty to get the lion back into the cage, and that as he was killed in the discharge of his duty, the accident arose out of and in the course of his employment. *Hapelman v. Poole* (1908), 25 T. L. R. 155; 2 B. W. C. C. 48.

Authority for a servant to act on an emergency in his master's interest may be implied. Where a workman was injured in attempting to stop his master's runaway horse, it was held that the accident arose out of and in the course of the employment, although his work was wholly unconnected with the horses. *Rees v. Thomas* (1899), 80 L. T. 578; 1 W. C. C. 9.

A man employed by the owner of a canal boat, as driver, who was forbidden by his employer to take part in the steering or management of the boat, was drowned while engaged in steering. A boatman who had been temporarily in charge of the horse had deserted a short time before the accident, and the other boatman who was also master of the boat, then decided to drive, telling the deceased at the same time to steer. It was held that no emergency had arisen which justified the deceased in violating the orders of his employer in steering the boat, and that therefore the accident did

not arise out of and in the course of the employment. *Whelan v. Moore* (1909), 43 Irish L. T. 205; 2 B. W. C. C. 114.

Saving life of another. An accident occurring while making an attempt to save the life of a fellow workman was held to arise out of and in the course of the employment. *Matthews v. Bedworth* (1899), 1 W. C. C. 124.

Larking, joking or fooling. A boy, set to clean a machine at rest, was larking with another boy, and accidentally started the machine, thereby injuring himself. It was held that the accident did not arise out of the employment. *Cole v. Evans, Son, Lescher & Webb* (1911), 4 B. W. C. C. 138; following *Furniss v. Gartside & Co.*, 3 B. W. C. C. 411. A domestic servant while engaged in the performance of her duties was struck on the eye by a child's ball playfully thrown at her by a fellow servant, the child's nurse, with the result that she almost completely lost the sight of the eye. It was held that the accident did not arise out of the employment within the meaning of § 1 (1) of the Act of 1906. *Wilson v. Laing* (1909), 46 Scotch L. R. 843; 2 B. W. C. C. 118. Some workmen, as a practical joke, put the hook of their employers' crane, which they were working, through the neckcloth of a fellow workman who was at the time engaged in his work on his employers' wharf, and commenced to draw him up through the warehouse. The man held the chains with his hands as long as he could, but eventually had to let go his hold, and fell a considerable distance and was seriously injured. It was held that the injury did not arise out of the employment. *Fitzgerald v. Clarke & Son* (1908), 99 L. T. 101; 1 B. W. C. C. 197. Where one workman,

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in the spirit of horseplay had placed another in a very dangerous situation, and a third workman going to his rescue, was seriously injured, it was held that the workman who took the risk, was not injured while performing any of the duty owing to his employers and that therefore the injury did not arise out of and in the course of the employment. *Mullen v. D. Y. Stewart & Co.* (1908), 45 Scotch L. R. 729; 1 B. W. C. C. 204. The applicant for compensation, one Shaw, had for no apparent reason pushed another workman named Dilworth against a moving rope. Dilworth involuntarily swung up one hand, in which he held a hammer, to prevent falling over the moving rope, and this hammer hit the applicant over the eye and injured him so badly that he lost the sight of the eye. It was held that the accident did not arise out of the employment. *Shaw v. Wigan Coal & Iron Co.* (1909), 3 B. W. C. C. 81.

Injury by fellow workman who is violating law at time of injury. The fact that an injury is caused by a fellow workman who has violated the Factory Act, and upon whom a fine has been inflicted because of such violation, is no reason for denying compensation to the employé who has been injured. *Gibson v. Dunkerley Brothers* (1910), 3 B. W. C. C. 345.

Malicious injury by another workman. A workman was struck in the eye by a piece of iron maliciously thrown by another workman at a third employé, and it was held that the accident did not arise out of the employment. *Armitage v. Lancashire and Yorkshire Ry. Co.* (1902), 86 L. T. 883; 4 W. C. C. 5.

Engine driver hit by stone thrown by boy from bridge. An injury to an engine driver in being hit by a stone thrown by boys from an overhead bridge is an accident

arising out of the employment. *Challis v. London & South Western Ry. Co.* (1905), 7 W. C. C. 23.

Lockjaw resulting from nail in foot. A gardener while digging in his employer's garden, was injured by a nail piercing his foot through his boot, and died subsequently from tetanus. It was held that the accident arose out of and in the course of his employment, and his dependents were entitled to compensation. *Walker v. Mullins* (1908), 42 Irish L. T. 168; 1 B. W. C. C. 211.

Placed in position of peculiar danger. It is not enough for a workman to assert that an accident which has caused personal injury to him would not have happened if he had not been in the particular place where it occurred. But it must be shown that the accident arose because of something he was doing in the course of his employment, or because it placed him in a position of peculiar danger, and the risk incurred was therefore incidental to his employment. *Craske v. Wigan* (1909), 100 L. T. 8; 2 B. W. C. C. 35.

Struck by lightning. A workman, engaged on the road during a storm, whose duty was to clean out the gulleys to prevent the water flooding the road, was struck by lightning. It was held that the death was not occasioned by accident arising out of the employment. *Kelly v. Kerry County Council* (1908), 42 Irish L. T. 23; 1 B. W. C. C. 194. But see *Andrew v. Failsworth Industrial Soc.* (1904), 90 L. T. 611; 6 W. C. C. 11, where a bricklayer on a scaffold, twenty-three feet from the ground, was struck by lightning and it was held that this was an accident.

Bite of cat on master's premises at meal time. A workman was taking his mid-day meal in his employer's

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stable, when he was bitten by one of the stable cats. The bite resulted in blood poisoning and it became necessary to amputate some of the fingers. It was held that the accident arose out of and in the course of the employment. *Rowland v. Wright* (1908), 1 B. W. C. C. 192.

Special policeman and messenger injured while going to and from place of employment. A railway policeman, a part of whose duties it was to take cash boxes and deposit the contents in a bank in the town, was returning from such a trip when he was crossing a railway track over a way which was sometimes used by the employés. An engine being shunted down these tracks hit and killed the policeman. It was held that the accident arose out of and in the course of the employment and that his dependents were entitled to compensation. *Grant v. Glasgow and South Western Railway Co.* (1907), 45 Scotch L. R. 128; 1 B. W. C. C. 17.

Suffocation in burning house. A servant residing in her mistress's house was suffocated in her bedroom through a fire which broke out in the house. She shared the room with a lame cook, and she and the cook were suffocated. It was held that the accident arose out of and in the course of the employment. *Chitty v. Nelson* (1908), 2 B. W. C. C. 496.

Drawing inference from unexplained injuries. An engine driver, over sixty years old, was working about the engine at a railway station. He was next seen lying between the engine and the platform with his two legs doubled up, exhibiting signs of agony, and he died a few minutes later. There was no evidence to show how he got into this position, but there was evidence to show that on at least three previous occasions when the

train was at a station, the deceased had collapsed in a faint, and had lain unconscious for some minutes. A few days before the occurrence the deceased was examined by the physician of the company and was presumably passed as physically fit for his position. The County Court judge held that the accident arose out of and in the course of his employment. It was held that there was sufficient evidence to justify the finding. *Fennah v. Midland & Great Western Railway of Ireland* (1911), 45 Irish L. T. 192; 4 B. W. C. C. 440. In this case the court said: "The judge is entitled to draw an inference, but he cannot arrive at it by guess or conjecture; and the onus is, in the first instance, on the applicant to furnish evidence from which an inference in the applicant's favor can be legitimately drawn."

A train of three cars pushed by an engine overtook another train on the same tracks, and the two trains ran buffer to buffer as if coupled. The brakeman of the rear train tried to get on the front train, but slipped between the buffers and was killed. There was no direct evidence as to his reasons for trying to board the front train, but there was evidence that he would shortly have had to alight to shift some points (switches), and that it was much easier to alight from the front than from the rear train, the former having steps while the latter had none. From this the County Court judge drew the inference that the attempt was made in order to alight more easily, and therefore held that the accident arose out of the employment. It was held on appeal that the County Court judge was entitled to draw this inference.* *Astley v. R. Evans & Co.* (1911), 104 L. T. 373; 4 B. W. C. C. 209; affirmed by

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the House of Lords, *R. Evans & Co. v. Astley* (1911), 4 B. W. C. C. 319.

While a ship was on the high seas the cook fell overboard and was drowned. The weather was perfectly calm at the time. It was daylight and the ship was steady. There was no evidence to show how the deceased had fallen overboard. It was held that the dependent had failed to discharge the onus upon her of proving that the accident arose out of and in the course of the employment of the deceased, there being no justification for inferring that the accident arose out of the employment because it was admitted that it happened in the course of the employment. *Bender v. Owners of Steamship "Zent"* (1909), 100 L. T. 639; 2 B. W. C. C. 22. In the last mentioned case one of the judges stated by way of *dictum* that if, on a stormy night, one of the watches of the ship was missing, the inference to be drawn would be that the most natural cause of the accident was the increased danger to which the seaman was subjected in the course of his employment, and that therefore the accident arose out of his employment.

Commercial travelers. As a rule commercial travelers may be regarded as acting in the course of their employment so long as they are traveling on their employer's business, including the whole period of time between their starting from and returning to their place of business or home. *Dickinson v. Barmak* (1908), 124 L. T. Newspaper, 403.

Collector going from house to house. An agent who is making a house-to-house collection of premiums and meets with accidental injury is entitled to compensation. *Refuge Assurance Co. v. Millar*, 49 Scotch L. R. 67.

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Collector using bicycle in employment without or direction or prohibition of employer. A canvasser and collector, employed to go round calling on customers, usually went on his bicycle. This was not necessary, but his employers who knew of the practice, neither ordered him to do so, nor forbade him to do it. While traveling on a bicycle he collided with a tramcar and was killed. It was held that the accident arose out of the employment. *Pierce v. The Provident Clothing and Supply Co.* (1911), 104 L. T. 473; 4 B. W. C. C. 242.

A salesman and collector while riding in a street upon a bicycle, in the course of his employment, was kicked on the knee by a passing horse and injured. It was held that the accident arose out of the employment. *M'Neice v. Singer Sewing Machine Company* (1911), 48 Scotch L. R. 15; 4 B. W. C. C. 351.

Heart failure. A workman collapsed at his work, and died the same day from angina pectoris. The evidence was that his heart was in a bad state, and that the attack might have been caused by exertion, or might have been due to natural causes. It was held, reversing the decision of the County Court judge, that the dependents had not discharged the onus of proving that the accident arose out of the employment. *Hawkins v. Powell's Tillery Steam Coal Co.* (1911), 104 L. T. 365; 4 B. W. C. C. 178.

Reaching to recover pipe dropped from wagon. A workman was employed as a laborer in connection with loading and unloading wagons, and accompanying them while being hauled by a traction engine from one quarry to another. While sitting on a wagon which was being so hauled, he dropped his pipe, and, in attempting to get down to recover it, he lost his balance and

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fell in front of the wheels of the wagon, which went over his leg, fatally injuring him. It was held that the accident arose out of and in the course of the employment. *M'Lauchlan v. Anderson* (1911), 48 Scotch L. R. 349; 4 B. W. C. C. 376. The court applied the rule laid down by the Lord Chancellor in the case of *Moore v. Manchester Liners* (1910), A. C. 498, as follows: "I think an accident befalls a man 'in course of' his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing." The court added "a workman of his sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again."

Cause of injury not incidental to employment. A lady's maid, in the course of her employment, was sewing at an open window, through which an insect flew into her face. To defend her eyes she quickly put up her hand, which accidentally struck and permanently injured her eye. It was held that the injury was not a personal injury by accident arising out of the employment. *Craske v. Wigan* (1909), 100 L. T. 8; 2 B. W. C. C. 35.

Rebuilding station not employment on railway. Rebuilding stations is work "merely ancillary or incidental to and is no part of or process in the trade or business carried on by" a railway company. *Pearce v. London and South Western Ry.* (1900), 82 L. T. 487; 2 W. C. C. 47.

Employment in a refreshment room at a station not employment on railway. Employment in a refreshment room at a railway station is not employment on or in

or about a railway. *Milner v. Great Northern Ry. Co.* (1900), 82 L. T. 187; 2 W. C. C. 51.

Going to designated place to receive pay. A workman engaged as a laborer on the public roads was required to go for his pay to the tramway depot situated in a public road some distance away. The workman was paid for the time occupied in going to and going from the pay place. When returning to his work, after receiving his wages, he mounted a tram car, but finding that it did not travel to the place where his work was situated, he got off and was struck by a passing cart and injured. It was held by the Court of Appeal in England that the injury was one arising out of and in the course of the man's employment. *Nelson v. Belfast Corporation* (1908), 42 Irish L. T. 223; 1 B. W. C. C. 158.

A workman will be held to be acting in the course of his employment, when, having ceased actual work, he returns to the premises to obtain his pay. *Riley v. W. Holland & Sons* (1911), 1 K. B. 1029; 4 B. W. C. C. 155. Even though on such ceasing of actual work the relation of master and servant is terminated. *Riley v. W. Holland and Sons* (1911), *supra*; *Molloy v. South Wales Anthracite Colliery Co.* (1910), 4 B. W. C. C. 65.

A mill-hand, whose employment had ended, attended at the employer's mill to receive her wages a few days later, in accordance with the usage of the trade. She met with an accident while leaving. It was held that the accident arose out of and in the course of the employment. *Riley v. W. Holland & Sons* (1911), 104 L. T. 371; 4 B. W. C. C. 155.

A miner who left off work at 5 A. M. on Saturday

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morning, but would have resumed work on the Sunday night following, went to the works at 12.30 mid-day on Saturday to receive his wages, and while proceeding on his employers' premises with this purpose he was injured by a railway engine which ran through the employers' premises; it was held that the accident arose out of and in the course of his employment. *Lowry v. Sheffield Coal Co.* (1907), 24 T. L. R. 142; 1 B. W. C. C. 1.

Where a workman was required to go in a tram car to a depot, situated on a public road some distance away from his work to secure his pay and he received wages during the time he was on the journey, it was held that a personal injury received by the workman by being hit by a wagon when getting off the wrong tram car which he had entered by mistake, was an injury arising out of and in the course of his employment. *Nelson v. Belfast Corporation* (1908), 42 Irish L. T. 223; 1 B. W. C. C. 158.

A collier received his pay-note on Saturday. Being dissatisfied with the amount, he spoke to the manager, who referred him to the under-manager. The latter could not be seen until Monday. The collier came on Monday at mid-day, not intending to resume work unless the dispute was settled in his favor, and saw the under-manager, who did not give in. The collier then proceeded to leave, but was knocked down by a coal wagon and killed. It was held that the accident did not arise out of, nor in the course of the employment. *Phillips v. Williams* (1911), 4 B. W. C. C. 143.

Returning to place of employment to get tools. A workman a few days after leaving his work obtained leave to go down into the mine to bring up his tools, and while

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there for that purpose met with an accident. The County Court judge found that the accident arose out of and in the course of the man's employment with the colliery owners, and awarded him compensation. The employer appealed on the ground that the judge had misconceived the facts. The employer contended that the finding of fact should have been on the evidence that the workman had ceased to be their servant, and had met with the accident while in the mine on his own business. The Court of Appeal decided against the employer on the ground that the appellate court had no jurisdiction to interfere with the findings of fact of the County Court. *Molloy v. South Wales Anthracite Colliery Co.* (1910), 4 B. W. C. C. 65.

Remaining on property after suspension from work. A collier after he was suspended from work remained in a portion of the mines where he was told not to be and there met with an accident about two hours after his suspension. It was held that the accident arose out of and in the course of the employment. *Smith v. South Normanton Colliery Co.* (1902), 88 L. T. 5; 5 W. C. C. 14.

6. Who is a "workman" within the meaning of the Compensation Acts.

Various questions have arisen between partners, share-workers, contractors and sub-contractors and others as to when a man is a "workman," or an "employé," so as to be entitled to compensation in case of injury. The old decisions on the question of when the relation of master and servant exists are, of course, to a certain extent, applicable here. The decisions on the subject arising directly under the compensation prin-

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ciple have been cited below. Of course it does not necessarily follow that the compensation principle applies to all cases where the relation of master and servant, or employer and employé, exists. Some of the acts specifically exclude certain occupations such for example as farm laborers, domestic servants and casual employés. Others only apply to certain hazardous occupations leaving all others under the old employers' liability laws. The particular statute under which the question arises must first be consulted. After this is done a study of the cases cited hereinafter will materially aid the practitioner in arriving at a correct conclusion.

Workman injured before act takes effect but dies after statute effective. A stereotyper in the employment of a newspaper, showed, early in 1907, symptoms of lead poisoning. He finally left the employment on June 22, 1907, and eventually died on September 14, 1907. The Act of 1906 came into operation on July 1, 1907. It was held that the provisions of the Act were not applicable, since the deceased was not at the date of the commencement of the Act in the employment of the respondents, or of any one else, and that accordingly his widow was not entitled to compensation. *Greenhill v. The Daily Record, Glasgow* (1909), 46 Scotch L. R. 483; 2 B. W. C. C. 244.

Unauthorized employment by agent of employer. An injured man was engaged by another workman. The employer of such workman only authorized him to employ a boy. It was held that the employment of an old man, when the employer only authorized the engagement of a boy, prevented the applicant being held to be a workman under a contract of service with the

respondent. *M'Clelland v. Todd* (1909), 43 Irish L. T. J. 75; 2 B. W. C. C. 472.

Member of employer's family. A son, employed by his father, lived with him and paid him board and lodging. He was injured while absent for several weeks on his father's business. It was held that he was a member of his employer's family, dwelling in his house, and was therefore not a workman within the Act. *M'Dougall v. M'Dougall* (1911), 48 Scotch L. R. 315; 4 B. W. C. C. 373.

Vessel worked on shares. Two decisions in the Court of Appeal in England in which different decisions were reached by the same judges, have left in some doubt the question whether the master of a ship who sails the same on shares with the owners, is an employé of the owners. In the case of *Boon v. Quance, No. 1* (1909), 102 L. T. 443; 3 B. W. C. C. 106, the Court of Appeal of England held that the master was not the employé of the owner. In that case the captain, who sailed a small vessel with a crew of three under the thirds or sharing system, was at liberty to take any cargoes to any place he pleased, the owner receiving one-third of the gross receipts and doing necessary repairs to the ship. The captain received the remaining two-thirds, and had to pay and feed the crew (whom he engaged) and also pay harbor dues. The vessel went down with all hands and the captain's dependents claimed compensation. It was held that there was no contract of service between the captain and the owners and consequently the dependents were not entitled to compensation.

In the subsequent case of *Jones v. Owners of the Ship "Alice and Eliza"* (1910), 3 B. W. C. C. 495, the crew

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of a small schooner consisted of the captain, a mate and sometimes a boy. The master, in returning to the schooner at night, fell from the dock and was drowned. The claimant's evidence was that the captain received two-thirds of the income from the operation of the vessel for his services. The owner did not submit any evidence, but contended that under the doctrine announced in the case of *Boon v. Quance, No. 1, supra*, there was no contract of hiring and that therefore the captain's dependents could not maintain a right to compensation. The court awarded compensation nevertheless, distinguishing the two cases. The line of demarcation between them seems to be that in the *Boon* case the evidence was that the captain had full control of the ship *and paid to the owner one-third of the receipts*. While in the *Jones* case the only evidence before the court was that the master was remunerated *by the payment to him of two-thirds of the gross receipts*. The court commented on the failure of the owner to give any evidence at the trial and said that under the testimony given there was a distinction between the two cases.

In a later case the doctrine of the decision in *Boon v. Quance* is reaffirmed. Thus a vessel was sailed under the "sharing system." The captain had authority to trade between any ports he pleased, the owner having no control over him in this matter. The owner received one-half of the gross receipts, after deducting port charges, etc., and the captain retained the remainder, out of which he paid the crew's wages. It was held that there was no contract of service between the owner and the captain, and that the latter's widow was not entitled to compensation. *Hughes v. Postlethwaite* (1910), 4 B. W. C. C. 105.

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A firm of fish-curers engaged A to work a "flitboat" belonging to them, and authorized him to find another man to go along with him. A engaged B to work under him on the boat, which was not in any sense a fishing boat, but was used for carrying cargo between the curing stations and vessels lying off shore and landing goods from steamers. A and B were to be remunerated by one-third each of the gross earnings of the boat, the remaining third going to the owners. The boat was maintained by the owners, and both the men and the boat were subject to their orders. When not required by the owners he worked for other curers, such work being undertaken by A as skipper on behalf of the boat, and the rates charged being the same as those paid by the owners to the boat for similar work. When the men were not employed afloat, the owners, whenever possible, supplied them with work ashore. No part of the capital embarked was supplied by A or B, nor were they liable for any loss that might be incurred. In the course of his employment as boatman, B was drowned and it was held that he was not a partner but a workman in the sense of the Act, and therefore his dependents were entitled to compensation. *Jamieson v. Clark* (1908), 46 Scotch L. R. 73; 2 B. W. C. C. 228.

A member of the crew of a trawler, which is worked on shares, and who is therefore a coadventurer, is not entitled to compensation where he does some other act voluntarily which is in connection with his regular work. *Whelan v. Great Northern Steam Fishing Co.* (1909), 100 L. T. 912; 2 B. W. C. C. 235.

A person who owned ten sixty-fourth shares of a trading schooner was employed as a master by the managing owner and met his death while in the course

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of his employment. It was held that the absence of any proof of partnership or joint-adventure in a course of trading, the master was a workman and his dependents were entitled to recover compensation from the managing owner. *Carswell v. Sharpe and Others* (1910), 47 Scotch L. R. 335; 3 B. W. C. C. 552.

An engineer, on a steam fishing vessel, who was injured, was remunerated by $\frac{1}{24}$ share of the net profits of a catch, with a guarantee, by the owners of the vessel, that should his profit fall short of 30s. a week, they would make it up to that amount. It was held that the workman was "remunerated by a share," and therefore not entitled to compensation, as the word "solely" is not to be read into the § 7 (2) of the Act. *Admiral Fishing Co. v. Robinson* (1910), 102 L. T. 203; 3 B. W. C. C. 247.

Where one G, a member of a fishing vessel, was injured while the vessel was at sea and engaged in fishing, and it appeared that he was compensated by a share of the receipts from the trip, based as follows: From the gross price of the fish sold after any trip the owners of the vessel were entitled to deduct commission, discount, and other expenses pertaining to the trip, and the net balance remaining was then divided into fourteen shares, of which G received one-eighth share. While in port and employed in cleaning or making repairs he was paid a daily wage of 5s. It was held that G was remunerated by a share of the profits of the gross earnings of the working of the fishing vessel, and was not entitled to a recovery of compensation under § 7 (2) of the Act. *Aberdeen Steam Trawling & Fishing Co. v. Gill* (1907), 45 Scotch L. R. 247; 1 B. W. C. C. 274.

Driver of taxi-cab operated on shares. A taxi-cab driver

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occasionally took a cab out for the day from the owners' yard. He paid the owners 75% of his receipts, and accepted certain conditions as to the use of a uniform and the purchase of petrol. There was little or no control exercised over him, although the words "servant" and "dismissal" occurred on notices issued by the owners to the drivers and the public. It was held, by the House of Lords, that the question of whether or not he was a workman was one of fact and that there was evidence to support the finding of the County Court judge that the contract between the parties was not a contract of service and that the driver was accordingly not a workman within the Compensation Act. *Bates-Smith v. General Motor Cab Co.* (1911), A. C. 188; 4 B. W. C. C. 249, aff'g (1910), 3 B. W. C. C. 500. In the last-mentioned case it was remarked that it might well be that, as between third parties, the driver was the agent of the proprietor, whereas between themselves the relation was that of a bailor and bailee.

A taxi-cab driver took out a cab owned by the respondents from their yard each day. The contract between the parties was that the driver paid over to the respondents 75% of his daily takings, retaining 25% for himself, less the price of petrol which he purchased from the respondents. There was a considerable amount of evidence as to the relationship between the parties. The County Court judge held that the driver was employed by the respondents and that the contract was one of service. It was held that there was no evidence to justify this finding and compensation was denied by the Court of Appeal. *Doggett v. Waterloo Taxi-Cab Co.* (1910), 102 L. T. 874; 3 B. W. C. C. 371. In the last-mentioned case the court said: "The posi-

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tion of the driver of a taxi-cab is, in most respects, identical with the position of the driver of a horse-cab. It has been held by a series of authorities by which we are bound that the relation of a proprietor of a horse-cab and a driver is not in ordinary circumstances one of master and servant; although as between a member of the public injured through the negligence of the driver the proprietor is liable. * * * The contract between the proprietor and the driver is for the day on which the taxi-cab is taken out, as the learned judge finds. The driver is not bound to come the next day, and if he does come the proprietor is not bound to let him have a taxi-cab. He is not paid anything as wages. He is accountable to the proprietor for 75% of the takings, his own remuneration being a sum equal to 25% of the takings. This mode of remuneration tends against, and not in favor of, the view that he is a servant. The proprietor exercises no control over the driver, who can go when and where he pleases. * * * I think that the relation was that of bailment, although it may possibly be contended that the parties were co-adventurers. In the above observations I dealt only with the facts of this particular case. There may be cases in which the proprietor of a taxi-cab exercises such an amount of control over the driver as to justify the conclusion that the relation of master and servant exists." The court further remarked that the case of *Rex v. Solomons* (1909), 2 K. B. 980, apparently furnished an instance of the exception.

Independent contractor. A man who verbally agreed to break steel and clear cinders at so much per ton, and who employed five or six men to assist him and was paid weekly, was held to be an independent contractor

and not a workman within the meaning of the act. *Vamplew and Others v. Parkgate Iron & Steel Co.* (1903), 88 L. T. 756; 5 W. C. C. 114.

A man was engaged by a firm of timber merchants to bring a horse belonging to him and drag logs of timber from the side of a ship which was being unloaded in the harbor to a place where the logs were stored. He received a certain sum per day for himself and his horse, and he might have received that sum had he employed some one else to drive the horse. He was under no obligation to come on any particular day and he was told not to come until he was wanted. It was held that he was not a workman in the sense of the Act, but an independent contractor and therefore not entitled to compensation. *Chisholm v. Walker & Co.* (1908), 46 Scotch L. R. 24; 2 B. W. C. C. 261.

A person who contracts to do or get done work at a fixed price is not a workman within the meaning of the Act. *Simmons v. Faulds* (1901), 3 W. C. C. 169.

A quarryman was employed under a written agreement that he should be paid a certain sum per ton of material worked, his employers supplying him with the necessary tools. He engaged and discharged men to work under him. He ended his employment, but resumed it again upon his employers assuring him that he should be compensated in case he was injured by accident. It was held that there was evidence that he was a workman within the meaning of the Act and not an independent contractor. *Evans v. Penwyllt Dinas Silica Brick Co.* (1901), 4 W. C. C. 101.

Partners. When partners entered into an agreement that one of their number should act as a working foreman and he received 33s. a week for his services as

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such in addition to his share of the profits it was held that his widow was not entitled to compensation from the other partners because of the death of such foreman partner by accident, as he was not a workman within the meaning of the Act. *Ellis v. Ellis & Co.* (1905), 92 L. T. 718; 7 W. C. C. 97.

Policeman injured while acting as fireman. Where a police constable was acting as a fireman under an Act of Parliament, it was held that he was acting as a member of a police force, and was not a workman within the meaning of § 13 of the Act. *Sudell v. Blackburn Corporation* (1910), 3 B. W. C. C. 227.

Manager. A certified manager of a colliery receiving £400 a year with house rent free, who does no manual labor, is not a workman. *Simpson v. Ebbw-Vale Steel, Iron & Coal Co.* (1905), 92 L. T. 282; 7 W. C. C. 101.

Graduate chemist. A graduate and master of science of Manchester University engaged under a written contract as a chemist in a chemical factory, whose duties were largely the making of laboratory experiments and who, in connection therewith, did considerable manual labor was held not to be a workman within the British Act of 1897. *Bagnall v. Levinstein* (1906), 96 L. T. 184; 9 W. C. C. 100.

Law writer. Injury during lunch hour. A law writer was injured in the street during the hour allowed for his lunch. It was held that a law writer was within the act, but that the luncheon hour is not part of his period of employment, and therefore compensation was refused. *McKrill v. Howard & Jones* (1909), 2 B. W. C. C. 460.

Professional football player. A professional football player is a workman within the meaning of § 13 of the

Act. *Walker v. Crystal Palace Football Club* (1909), 101 L. T. 645; 3 B. W. C. C. 53.

Persons employed by charitable organization out of charity. A charitable institution which had instituted a labor yard, and which, in return for work done therein to persons out of employment, gave such persons their board and lodging and occasionally trifling sums of money, was held not to be employers as to one of the persons who had performed work under the rules stated, as the applicant had not proved a contract of service between himself and the institution. The question whether or not the institution carried on a trade or business was left open. *Burns v. Manchester & Salford Wesleyan Mission* (1908), 1 B. W. C. C. 305. A distress committee, which provides temporary work for an applicant is an employer within the meaning of the Workmen's Compensation Act and a person injured is entitled to compensation. *Gilroy v. Mackie and Others (Leith Distress Committee)* (1909), 46 Scotch L. R. 325; 2 B. W. C. C. 269. The Central Body under the Unemployed Workmen Act of 1905, are "employers" within the meaning of the Compensation Act, and when a workman employed by them is killed, his widow is entitled to compensation. *Porton v. Central (Unemployed) Body for London* (1908), 100 L. T. 102; 2 B. W. C. C. 296. A blind man was injured while employed in the industrial department of an institute for the blind. This department was supported partly by charitable contributions received by the institute. The institute gave the man, in respect of his services, board, lodging, and 5 shillings a month, and received on his account charitable and parochial assistance which came to a few pounds less than the amount it expended on

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him. It was held that the man was a workman. *MacGillivray v. The Northern Counties Institute for the Blind* (1911), 48 Scotch L. R. 811; 4 B. W. C. C. 429.

A dispensary medical officer employed by Guardians of the Poor was held not to be a workman, as there was no contract of service between him and an employer within the meaning of § 13 of the Compensation Act, and that therefore when such medical officer was killed, his dependents were not entitled to compensation. *Murphy v. Enniscorthy Board of Guardians* (1908), 42 Irish L. T. 246; 2 B. W. C. C. 291.

7. Who is agricultural worker.

A skilled carpenter employed on a farm as handy man, doing fence-work, harvesting and rick-making, and for three or four months a year acting as game-keeper may be a workman in agriculture. *Smith v. Coles* (1905), 93 L. T. 754; 8 W. C. C. 116.

8. Who is a casual employé.

The word "casual" is from the Latin *casualis*, meaning an accident; happening or coming to pass without design and without being foreseen or expected; coming without regularity. The word "casualty" has the same origin. The application of the word in the British Compensation Law has caused much discussion.

Window cleaner. The employment of a window cleaner, at irregular intervals, to clean the windows of a dwelling house, although the same person may have been engaged, when required, for a period of some years, is casual employment only. *Hill v. Begg* (1908), 1 B. W. C. C. 320. A window cleaner had been for some years in the habit of cleaning, about once a month, the windows of the respondent's private house.

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The respondent was a medical man, and used some part of his house for the purposes of the profession. No formal contract existed, but the window cleaner called at or about the expected periods and was admitted and did the work. It was found, as a fact, that the respondent might at any time have engaged any other window cleaner, or refused admission to the window cleaner in question. It was held that the employment was of a casual nature and was not employment for the purposes of the employer's trade or business. *Rennie v. Reid* (1908), 45 Scotch L. R. 814; 1 B. W. C. C. 324.

Laborer employed to do whitewashing. A laborer employed to do whitewashing and to be paid according to the amount of work done, the employer supplying the laborer with money to buy the necessary materials, is a workman in whose favor compensation should be awarded. *Bargewell v. Daniel* (1907), 123 L. T. J. 487; 9 W. C. C. 142.

Woman employed occasionally as domestic. A woman was employed to work at a particular house on Friday of every week and on Tuesdays in alternate weeks. She suffered personal injuries in the course of such employment. It was held that the employment was not of a casual nature and that the woman was a workman within the meaning of the Act, and therefore entitled to compensation. *Dewhurst v. Mather* (1908), 1 B. W. C. C. 328.

Carpenter employed to do repairs. A carpenter was employed to do repairs in the private house of the respondent, and after these repairs were finished was engaged to cut down some trees in the grounds near the house. While engaged in the latter work he was killed, and it was held that the employment was of a casual

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nature and compensation was refused. *M'Carthy v. Norcott* (1908), 43 Irish L. T. 17; 2 B. W. C. C. 279.

Bricklayer employed to repair farm building. A farmer required some tiles put on the roof of his granary and employed a bricklayer to put them on. During the work the bricklayer was injured and he afterward claimed compensation. It was held that although the work was of a casual nature it was for the purpose of the employer's trade or business, and therefore the workman was entitled to receive compensation. *Blyth v. Sewell* (1909), 2 B. W. C. C. 476.

Repairing private residence. Where a casual workman was employed to assist a slater in repairing the roof of a house *used solely for the purposes of business*, and was killed by falling from the roof, it was held that his dependents were entitled to compensation. *Johnston v. Monasterevan General Store Co.* (1908), 42 Irish L. T. 268; 2 B. W. C. C. 183. In the course of the opinion, in the last-mentioned case, it is said: "The Act of 1906 widened the liability of employers, and the scope of the Act was intended to include new classes of workmen in addition to those benefited by previous acts. Suppose the shutters of a shop got jammed and could not be opened, and a carpenter or locksmith was employed to open them, it is manifest that that would be for the purposes of the employer's business."

9. Serious and willful misconduct.

All the Compensation Acts of the various States contain some provision on this subject, but there is no uniformity in such provisions. Whatever the language used the idea of denying compensation if serious and willful misconduct causes the injury, is present in all of

these statutes. The decisions of the English, Irish, Scotch and Canadian courts therefore are especially applicable to this feature of the laws of the various commonwealths.

Where a workman knowingly breaks a rule made by the employer in the interests of the safety of the workmen and for their own protection and that of the public such act on his part is evidence of serious and willful misconduct within the meaning of the Act. *Bist v. London & South Western Ry. Co.* (1907), 96 L. T. 750; 9 W. C. C. 19. The last-mentioned case was decided by the House of Lords. The accident occurred on March 4, 1905, prior to the enactment of the present Compensation Law. In that case an engine-driver was killed by being hit by a bridge over the track. He had climbed back on the tender, for the purpose, it was contended, of getting a better quality of coal, to make the engine steam better so lost time could be made up. The company had issued a rule forbidding the driver or fireman to leave the running board while the engine was in motion. The court held that the violation of this rule was such serious and willful misconduct as precluded the dependents of the driver from recovering compensation. The section of the British Compensation Act under which this decision was made was amended in the revision of 1906 [§ I, (2) (c)] by adding the words in italics in the paragraph below, making it read as follows:

“If it is proved that the injury to a workman is attributable to the serious and willful misconduct of the workman, any compensation claimed in respect of that injury shall, *unless the injury results in death or serious and permanent disablement*, be disallowed.”

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The words in italics have added a feature to the British Act which has been characterized as follows:

"If a boiler was exploded through the criminal carelessness of an intoxicated engineer or fireman, it might demolish the plant, bring ruin as well as death to the employer, fatal and serious injuries to many employes, but the cause of the catastrophe, if disabled for life or killed, would find himself or his dependents a preferred creditor against the employer's estate, and his claim would be on the same footing with that of his fellow workmen to whom he had brought death or injury." ¹

Determined from nature of conduct not consequences. Whether or not misconduct is serious is to be determined from its nature, and not from its consequences. *Johnson v. Marshall Sons & Co.*, 22 T. L. R. 565.

Misconduct is not serious merely because the actual consequences in the particular case are serious; the misconduct must be serious in itself. Any neglect is serious within the meaning of the British Compensation Act, which in the view of reasonable persons in a position to judge, expose anybody, including the person guilty of it, to the risk of serious injury. Or if the injury to be feared is of such a character that it may be described as serious, then the case is within the language of the Act. *Hill v. Granby Consolidated Mines* (1906), 12 B. C. 118; 1 B. W. C. C. 436.

In the expression "serious and willful misconduct," the word "serious" applies to the misconduct itself and not to the actual consequence of it; and the word "willful" imports that the conduct was deliberate and not merely a thoughtless act on the spur of the moment.

¹ *Accident Prevention and Relief*, Schwedtmann and Emery, p. 204.

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Johnson v. Marshall, Sons & Co. (1906), 94 L. T. 828; 8 W. C. C. 10.

Question of fact not law. A finding of serious and willful misconduct is a finding of fact not of law. *Donnachie v. United Collieries* (1910), 47 Scotch L. R. 412.

Proof of negligence not sufficient. Proof of negligence merely is not sufficient to maintain a charge of serious and willful misconduct. *Rees v. Powell Duffryn Steam Coal Co.* (1900), 4 W. C. C. 17.

A boy working at a machine used for cutting screws leaned over a circular saw which was in motion, to pick up an uncut screw which had fallen from its place and in doing so injured his finger. He had been told frequently not to put his hand across the saw. It was held that there was evidence of negligence, but not of serious or willful misconduct which would preclude the boy from recovering compensation. *Reeks v. Kynoch* (1901), 4 W. C. C. 14.

Right to dismiss as test of serious and willful misconduct. Whether an employer would be justified in dismissing a workman without notice is a test of whether or not misconduct is serious and willful. *Johnson v. Marshall, Sons & Co.* (1906), 94 L. T. 828; 8 W. C. C. 10.

Obvious dangers. Where a miner was injured in crossing the shaft bottom, which was regarded as notoriously dangerous, although there was no special rule prohibiting miners from crossing it, it was held that he had been guilty of willful and serious misconduct and was not entitled to compensation. *Leishman v. William Dixon* (1910), 47 Scotch L. R. 410; 3 B. W. C. C. 560.

A boy removed a safety roller attached to a wringing

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machine and was injured in consequence. He had been in the habit of removing the roller and working without it although cautioned not to do so. There was some rather weak evidence that the uses of the roller had been explained to him. It was held that the injury was not attributable to serious and willful misconduct. *Darbon v. Gigg* (1904), 7 W. C. C. 32.

A miner while on his way out of the mine was advised to enter a manhole to allow a "journey" of cars to pass him. He disregarded the advice and was overtaken and killed by the cars. It was held that he was guilty of serious and willful misconduct. *John v. Albion Coal Co.* (1901), 4 W. C. C. 15. The above entitled case was decided before the enactment of the Compensation Law of 1906. In the previous Compensation Law serious and willful misconduct was sufficient to preclude a workman or his dependents from recovering compensation. In the amendment of 1906, however, it was provided that should serious and willful misconduct result in serious and permanent disablement or death, compensation should be awarded notwithstanding the misconduct.

The proper and safe way to proceed from a lower to a higher level of a mine was by a ladder, although the miners habitually used a sump shaft provided for raising metals. At the time of the accident a miner was leaving by way of the sump shaft. It was held that the accident arose out of and in the course of the employment, and was not due to serious and willful misconduct. *Douglas v. United Mineral Mining Co.* (1900), 2 W. C. C. 15.

Drunkenness. Drunkenness when it occasions the injury may amount to serious and willful misconduct. *Bradley v. Salt Union* (1906), 122 L. T. J. 302; 9 W. C. C.

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31. Mounting a ladder while drunk, with a long piece of timber on one shoulder, and out of bravado, was held to be serious and willful misconduct. *Burrell v. Avis* (1898), 1 W. C. C. 129.

Misrepresentation by infant as to age. An infant made a false representation to the effect that he was of full age in order to secure employment. It did not appear that the accident in question was attributable solely to such misrepresentation. Subsequently having been injured in the course of his employment so obtained, he signed a release, but later tendered repayment of the money paid to him on signing the release, and started proceedings under the Act. It was held that the infant was not guilty of serious and willful misconduct, and that the release was not a bar to the recovery of compensation. *Darnley v. Canadian Pacific Ry. Co.*, 14 B. C. R. 15; 2 B. W. C. C. 505.

Disobedience of orders and rules. It is not every breach of a rule that will constitute serious and willful misconduct. The question is one purely of fact to be determined by the arbitrator in each case. (House of Lords) *George v. Glasgow Coal Company* (1908), 99 L. T. 782; 2 B. W. C. C. 125.

A bare breach of a regulation from which no injury could reasonably be anticipated is not serious misconduct. *Johnson v. Marshall, Sons & Co.* (1906), 94 L. T. 828; 8 W. C. C. 10.

If a workman unnecessarily breaks an express and emphasized order made solely for his own protection, and which he fully understands and appreciates, he is guilty of serious and willful misconduct. *Jones v. London & South Western Ry. Co.* (1901), 3 W. C. C. 46. Deliberate and intentional disobedience on the part of

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a workman to an oft-repeated order whereby he and his fellow workmen are placed in danger, is serious and willful misconduct. It is no answer to this defense that the workman believed the course he was adopting when disobeying his instructions was not a dangerous one. *Brooker v. Warren* (1907), 23 T. L. R. 201; 9 W. C. C. 26. In the last-mentioned case a fatal accident was caused by the act of the deceased in removing a guard from a circular saw. Compensation was refused.

A workman was cautioned by a foreman not to use a freight elevator until he was acquainted with it. He, nevertheless, attempted to use it and later in the day was found dead, jammed between the side of the elevator and the floor. There was no evidence that he had not been instructed in the use of the elevator and that he had not had an opportunity of becoming acquainted with it. It was held that the employers had not discharged the onus resting upon them to show that the deceased had been guilty of serious and willful misconduct, and therefore compensation was awarded. *Granick v. British Columbia Sugar Refinery Co.* (1910), 15 B. C. R. 193; 4 B. W. C. C. 452, rev'g (1909) 14 B. C. R. 251; 2 B. W. C. C. 511.

A collier ordered to cut a road in the colliery left his work and went to cut coal in a part of the mine where it was forbidden by special rule to cut any, and he thereby undermined some props, and caused a fall, which killed him. It was held that the accident did not arise out of nor in the course of the employment. The court said: "If a workman is doing something outside the scope of his employment, the proof of serious and willful misconduct does not bring the accident within

the scope of the employment." *Weighill v. South Heaton Coal Co.* (1911), 4 B. W. C. C. 141.

A servant girl was forbidden to stand on the ledge of a glass frame to hang out clothes in the garden. She did stand on it and slipped, breaking one of her ribs. It was held that the applicant was guilty of serious and willful misconduct, and she was not entitled to compensation. *Beale v. Fox* (1909), 2 B. W. C. C. 467.

The owners of a factory posted a notice near an elevator reading as follows: "No one is allowed to use this hoist except in charge of a load." A workman just before mealtime got in the lift alone and a few moments later was found injured so he died shortly afterwards from being caught between the floor of the elevator and the top of the door. It was shown that the employés frequently violated the rule contained in the notice, but it appeared that this was unknown to the employers. The employers offered no evidence as to any danger in using the lift in violation of the notice, but rested merely on the disobedience to defeat the dependent's claim for compensation, on the ground of serious and willful misconduct. The House of Lords held that the employers had not sustained the burden of showing such serious and willful misconduct as would defeat the right to compensation. *Johnson v. Marshall, Sons & Co.* (1906), 94 L. T. 828; 8 W. C. C. 10.

The special rules of a mine imposed upon the miner working at the coal seam bottom of the mid-working the duty of keeping the gate which fenced the working from the shaft closed until the cage had been brought to the level of the working and brought to a standstill, so that it might be safely entered from the working. The

Serious and willful misconduct

miner opened the gate before he had ascertained that the cage had been brought to the level of the working and to a standstill. He then, assuming the cage was there, pushed a hutch forward, which fell down the shaft and the miner fell also and was injured. It was found that the injury would not lead to serious and permanent disablement, and that the miner was guilty of serious and willful misconduct, and therefore he was not entitled to compensation. *George v. Glasgow Coal Co.* (1908), 45 Scotch L. R. 687; 1 B. W. C. C. 239. A special rule applicable to a mine pit provided that "a workman shall not permit a naked light to remain * * * in such a position that it could ignite the explosive." A miner was injured by the explosion of gunpowder. The arbitrator held that the miner "having permitted his naked light to remain in such a position that it ignited the gunpowder, and having failed to establish any circumstances justifying his doing so committed a breach of said special rule, and that therefore his injuries were attributable to his serious and willful misconduct," and compensation was denied. The Court of Sessions of Scotland, on appeal, held that this was a finding on a question of fact and affirmed the ruling. *Donnachie v. United Collieries* (1910), 47 Scotch L. R. 412.

A boy, in disobedience of orders, was cleaning a machine in motion, and his right hand was drawn into the machine and the top joint of the first and third fingers torn off. The County Court judge held that the injury was attributable to the serious and willful misconduct of the workman, but that it resulted in serious and permanent disablement, and he therefore awarded compensation. It was held on appeal that the injury

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resulted in permanent disablement and that there was evidence on which the County Court judge could find that the disablement was serious. *Hopwood v. Olive & Partington* (1910), 3 B. W. C. C. 357.

It is serious and willful misconduct for a workman to deliberately meddle with new and unfamiliar machinery contrary to an express order given immediately before. *Forster v. Pierson* (1906), 8 W. C. C. 19.

Disobedience to an order of a deputy amounting to a breach of a general rule of a mine is serious and willful misconduct. *Watson v. Butterley Co.* (1902), 5 W. C. C. 51.

CALIFORNIA

(L. 1911, c. 399)

“§ 3. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury accidentally sustained by his employés, and for his death if the injury shall approximately cause death, in those cases where the following conditions of compensation concur:

“(1). Where, at the time of the accident, both the employer and employé are subject to the provisions of this act according to the succeeding sections hereof.

“(2). Where, at the time of the accident, the employé is performing service growing out of and incidental to his employment and is acting within the line of his duty or course of his employment as such.

“(3). Where the injury is approximately caused by accident, either with or without negligence, and is not so caused by the willful misconduct of the employé.

“And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provi-

California

sions of this act, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death, except that when the injury was caused by the personal gross negligence or willful personal misconduct of the employer, or by reason of his violation of any statute designed for the protection of employ  s from bodily injury, the employ   may, at his option, either claim compensation under this act, or maintain an action for damages therefor; in all other cases the liability of the employer shall be the same as if this and the succeeding sections of this act had not been passed, but shall be subject to the provisions of the preceding sections of this act."

The provisions of § 3 (2) above are very broad. They cover every possible employment. The only exception to be found in the statute is that contained in § 6 (2) ¹ which provides that the term "employ  " shall not include "any person whose employment is but casual and not in the usual course of the trade, business, profession, or occupation of his employer."

The other words of exclusion are also very broad. They limit the application of the act to employ  s who are engaged in the "*usual course of the trade, business, profession, or occupation*" of the employer. § 6 (2) page 135. These words would seem to exclude all domestic servants.

"§ 4. The following shall constitute employers subject to the provisions of this act within the meaning of the preceding section:

"(1). The State, and each county, city and county, city, town, village and school districts and all public corporations, every person, firm, and private corpora-

¹ See *post*, page 135.

tion (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employé for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, at the time of such accident, have withdrawn such election, in the manner provided in the next section.

“§ 5. Such election on the part of the employer shall be made by filing with the industrial accident board, hereinafter provided for, a written statement to the effect that he accepts the provisions of this act, the filing of which statement shall operate, within the meaning of section three of this act, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he withdraws his election to be subject to the provisions of the act.

“§ 6. The term “employé” as used in section three of this act shall be construed to mean:

“(1). Every person in the service of the State, or any county, city and county, city, town, village or school district therein, and all public corporations, under any appointment or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city and county, city, town, village or school district therein or any public corporation, who shall have been elected or appointed for a

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regular term of one or more years, or to complete the unexpired portion of any such regular term.

“(2). Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the State (who, for the purposes of the next section of this act, shall be considered the same and shall have the same power of contracting as adult employés), but not including any person whose employment is but casual and not in the usual course of the trade, business, profession or occupation of his employer.

“§ 7. Any employé as defined in subsection (1) of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employé as defined in subsection (2) of the preceding section shall be deemed to have accepted and shall, within the meaning of section 3 of this act, be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

“(1). The employer charged with such liability is subject to the provisions of this act, whether the employé has actual notice thereof or not; and

“(2). At the time of entering into his contract of hire, express or implied, with such employer, such employé shall not have given to his employer notice in writing that he elects not to be subject to the provisions of this act, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employé shall, without giving such notice, remain in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act.”

Illinois

“§ 27. The board shall cause to be printed and furnished free of charge to any employer or employé such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of every employer who shall file a statement of election under this act, and the date of the filing thereof, and a separate book in which shall be entered and indexed the name of every employer who shall file his withdrawal of such election, and the date of the filing thereof; and a book in which shall be recorded all awards made by the board; and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause notice of the fact to be given to his employés, by posting and keeping continuously posted in a public and conspicuous place such notice thereof in the office, shop, or place of business of the employer, or by publishing, or in such other manner as the board shall deem most effective, and the board shall cause notice to be given in like manner of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and withdrawals of election, and of the time of the filing of the same, shall conclusively be imputed to all employés.”

ILLINOIS

(L. 1911, c. 000)

“§ 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That any em-

 Illinois

ployer covered by the provisions of this Act in this State may elect to provide and pay compensation for injuries sustained by any employ   arising out of and in the course of the employment according to the provisions of this Act, and thereby relieve himself from liability for the recovery of damages, except as herein provided.

* * * * *

“(3) *a.* Every such employer is presumed to have elected to provide and pay the compensation according to the provisions of this Act, unless and until notice in writing of his election to the contrary is filed with the State Bureau of Labor Statistics.

“*b.* Every employer within the provisions of this Act failing to file such notice shall be bound hereby as to all his employ  s who shall elect to come within the provisions of this Act until January 1st of the next succeeding year and for terms of each year thereafter: PROVIDED, any such employer may elect to discontinue the payments of compensation herein provided, only at the expiration of any such calendar year, by filing notice of his intention to discontinue such payments, with the State Bureau of Labor Statistics, at least sixty days prior to the expiration of any such calendar year, and by posting such notice in the plant, shop, office or place of work, or by personal service, in written or printed form, upon such employ  , at least sixty days prior to the expiration of any such calendar year.

“*c.* In the event any employer elects to provide and pay compensation provided in this Act, then every employ   of such employer, as a part of his contract of hiring or who may be employed at the time of the taking effect of this Act and the acceptance of its provi-

¹ See Chapter I, *ante*, page 10.

sions by the employer, shall be deemed to have accepted all the provisions of this Act and shall be bound thereby unless within thirty days after such hiring and after the taking effect of this Act, he shall file a notice to the contrary with the Secretary of the State Bureau of Labor Statistics, whose duty it shall be to immediately notify the employer, and if so notified, the employer shall not be deprived of any of his common-law or statutory defenses, and until such notice to the contrary is given to the employer, the measure of liability of the employer for any injury shall be determined according to the compensation provisions of this Act: PROVIDED, HOWEVER, that before any such employé shall be bound by the provisions of this Act, his employer shall either furnish to such employé personally at the time of his hiring, or post in a conspicuous place at the plant or in the room or place where such employé is to be employed, a legible statement of the compensation provisions of this Act.

“§ 2. The provisions of this Act shall apply to every employer in the State engaged in the building, maintaining or demolishing of any structure; in any construction or electrical work; in the business of carriage by land or water and loading and unloading in connection therewith (except as to carriers who shall be construed to be excluded herefrom by the laws of the United States relating to liability to their employés for personal injuries while engaged in interstate commerce where such laws are held to be exclusive of all state regulations providing compensation for accidental injuries or death suffered in the course of employment); in operating general or terminal storehouses; in mining, surface mining, or quarrying; in any enterprise, or branch thereof, in which explosive

Illinois

materials are manufactured, handled or used in dangerous quantities; in any enterprise wherein molten metal or injurious gases or vapors or inflammable fluids are manufactured, used, generated, stored or conveyed in dangerous quantities; and in any enterprise in which statutory regulations are now or shall hereafter be imposed for the guarding, using or the placing of machinery or appliances, or for the protection and safeguarding of the employés therein, each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions and means of prosecution of the work therein, extraordinary risks to life and limb of the employé engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to the employés therein.

“§ 3. No common law or statutory right to recover damages for injury or death sustained by any employé while engaged in the line of his duty as such employé other than the compensation herein provided shall be available to any employé who has accepted the provisions of this Act or to any one wholly or partially dependent upon him or legally responsible for his estate: PROVIDED, that when the injury to the employé was caused by the intentional omission of the employer, to comply with statutory safety regulations, nothing in this Act shall affect the civil liability of the employer. If the employer is a partnership, such omission must be that of one of the partners thereof, and if a corporation, that of any elective officer thereof.

“§ 7. The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employés in his employment subject to the provisions

of this Act, and it shall not be in any way reduced by contributions from employ  s.

“   8. If it is proved that the injury to the employ   resulted from his deliberate intention to cause such injury, no compensation with respect to that injury shall be allowed.

Employers are not permitted to collect from employ  s any portion of the premium paid for insurance against liability under this Act.    15. See Chapter XXXIV, *post*.

“   21. The term “employ  ” as used in this Act shall be held to include only such persons as may be exposed to the necessary hazards of carrying on any employment or enterprise referred to in Section 2 of this Act. Persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer’s trade or business, are not included in the foregoing definition.

“   22. Section 21 shall not be construed to include any employ   engaged in any work of an incidental character unconnected with the dangers necessarily involved in carrying on any employment or enterprise referred to in Section 2, or in any work of a clerical or administrative nature which does not expose the employ   to the inherent hazards of any such employment or enterprise.”

The provisions of     21 and 22 show the effort which has been made to exclude domestic servants and to include only the persons who are engaged in the employer’s business. The meaning of the terms “casual” employ  s, and “employ  s engaged in any work of an incidental character unconnected with the dangers neces-

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sarily involved in carrying on any employment or enterprise" will undoubtedly be the subject of much discussion. For definitions and court decisions as to the term "casual" employés see pages 121 *et seq.*

KANSAS

(L. 1911, c. 218)

"§ 1. *The obligation.* If in any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act. Save as herein provided,¹ no such employer shall be liable for any injury for which compensation is recoverable under this act; provided, that (a) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he is employed; (b) if it is proved that the injury to the workman results from his deliberate intention to cause such injury, or from his willful failure to use a guard or protection against accident required pursuant to any statute and provided for him, or a reasonable and proper guard and protection voluntarily furnished him by said employer, or solely from his deliberate breach of statutory regulations affecting safety of life or limb, or from his intoxication, any compensation in respect to that injury shall be disallowed.

"§ 2. *Reservation of liability for wrong or negligence*

¹ See § 2, *post*, wherein it is provided that an injured workman or his dependents may elect whether to demand "compensation" or "damages" in certain cases.

in certain cases. Where the injury was proximately caused by the individual negligence, either of commission or omission, of the employer, including such negligence of the directors or of any managing officer or managing agent of such employer if a corporation, or of any of the partners if such employer is a partnership, or of any member if such employer is an association, but excluding the negligence of competent employes in the performance of their duties or of the employer's duty delegated to them, the existing liability of the employer shall not be affected by this act, but in such case the injured workman, or if death results from such injury, his dependents as herein defined, if they unanimously agree, otherwise his legal representative, may elect between any right of action against the employer upon such liability and the right to compensation under this act."

"§ 6. *Application of the act.* This act shall apply only to employment in the course of the employer's trade or business on, in, or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain; each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workman engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen. This act shall not apply in any case where the accident occurred before this act takes effect, and all rights

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which have accrued, by reason of any such accident, at the time of the publication of this act, shall be saved the remedies now existing therefor, and the court shall have the same power as to them as if this act had not been enacted.

"§ 7. This act shall not be construed to apply to business or employments which, according to law, are so engaged in interstate commerce as to be not subject to the legislative power of the State, nor to persons injured while they are so engaged.

"§ 8. It is hereby determined that the necessity for this law and the reason for its enactment, exist only with regard to employers who employ a considerable number of persons. This act, therefore, shall only apply to employers by whom fifteen or more workmen have been [employed] continuously for more than one month at the time of the accident and who have elected or shall elect before the accident to come within the provision hereof; provided, however, that employers having less than fifteen workmen may elect to come within the provisions of this act in which case his employés shall be included herein, as hereinafter provided."

"§ 10. *Incompetency of workman.* In case an injured workman is mentally incompetent or a minor, or where death results from the injury, in case any of his dependents as herein defined is mentally incompetent or a minor, at the time when any right, privilege or election accrues to him under this act, his guardian may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in this act provided for, shall run, so long as such incompetent or minor has no guardian."

"§ 44. All employers as defined by this act who shall elect to come within the provisions of this act

and of all acts amendatory hereof shall do so by filing a statement to such effect with the Secretary of State of this State at any time after taking effect of this act, which election shall be binding upon such employer for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or of any succeeding year, file in the office of the Secretary of State a notice in writing to the effect that he withdraws his election to be subject to the provisions of this act. Notice of such election or withdrawal shall be forthwith posted by such employer in conspicuous places in and about his place of business.

“§ 45. Every employé entitled to come within the provisions of this act, shall be presumed to have done so unless he serve written notice, before injury, upon his employer that he elects not to accept thereunder and thereafter any such employé desiring to change his election shall only do so by serving written notice thereof upon his employer. Any contract wherein an employer requires of an employé as a condition of employment that he shall elect not to come within the provisions of this act shall be void.”

“§ 47. In an action to recover damages for a personal injury sustained within this State by an employé (entitled to come within the provisions of this act) while engaged in the line of his duty as such or for death resulting from personal injury so sustained in which recovery is sought upon the ground of want of due care of the employer or of any officer, agent or servant of the employer, and where such employer has elected to come and is within the provisions of this act as hereinbefore provided, it shall be a defense for such

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employer in all cases where said employé has elected not to come within the provisions of this act; (a) That the employé either expressly or impliedly assumed the risk of the hazard complained of; (b) that the injury or death was caused in whole or in part by the want of due care of a fellow servant; (c) that said employé was guilty of contributory negligence; provided, however, that none of these defenses shall be available where the injury was caused by the willful or gross negligence of such employer, or of any managing officer, or managing agent of said employer, or where under the law existing at the time of the death or injury such defenses are not available."

MASSACHUSETTS

(L. 1911, c. 751)

"Part I, § 4. The provisions of sections one hundred and twenty-seven. to one hundred and thirty-five, inclusive, and of one hundred and forty-one to one hundred and forty-three, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, and of any acts in amendment thereof, shall not apply to employés of a subscriber while this act is in effect.

"§ 5. An employé of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employé shall not have given the said notice within thirty days of notice of such subscription. An employé who has given notice to his employer that he claimed his right of action at common law may waive such claim by a notice in

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writing which shall take effect five days after it is delivered to the employer or his agent."

"Part II, § 1. If an employé, who has not given notice of his claim of common-law rights of action, as provided in Part I, section five, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of the injury."

"§ 2. If the employé is injured by reason of his serious and willful misconduct, he shall not receive compensation.

"§ 3. If the employé is injured by reason of the serious and willful misconduct of a subscriber or of any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the subscriber shall repay to the association the extra compensation paid to the employé. If a claim is made under this section the subscriber shall be allowed to appear and defend against such claim only."
(As amended by L. 1912, c. 571.)

Casual employés are not included within the operation of the act. Part V, § 2. See Chapter XVII, *post*, page 338.

"Part V, § 5. The provisions of this act shall not apply to injuries sustained prior to the taking effect thereof."

MICHIGAN

(L. 1912, c. 000)

"Part I, § 5. The following shall constitute employers subject to the provisions of this act:

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"1. The State and each county, city, township, incorporated village and school district therein;

"2. Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employé for which compensation under this act may be claimed, shall in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section."

* * * * *

"Part I, § 6. Such election on the part of the employers mentioned in subdivision two of the preceding section, shall be made by filing with the industrial accident board hereinafter provided for, a written statement to the effect that such employer accepts the provisions of this act, and that he adopts, subject to the approval of said board, one of the four methods provided for the payment of the compensation hereinafter specified. The filing of such statement and the approval of said board shall operate, within the meaning of the preceding section, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least thirty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of this act: Provided, however, That such employer so electing

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to become subject to the provisions of this act shall, within ten days after the approval by said board of his election filed as aforesaid, post in a conspicuous place in his plant, shop, minor place of work, or if such employer be a transportation company, at its several stations and docks, notice in the form as prescribed and furnished by the industrial accident board to the effect that he accepts and will be bound by the provisions of this act."

"§ 7. The term 'employé' as used in this act shall be construed to mean:

"1. Every person in the service of the State, or of any county, city, township, incorporated village or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, township, incorporated village or school district therein: Provided, That one employed by a contractor who has contracted with a county, city, township, incorporated village, school district or the State, through its representatives, shall not be considered an employé of the State, county, city, township, incorporated village or school district which made the contract;

"2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the State who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employés, but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer.

"§ 8. Any employé as defined in subdivision one of

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the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employé as defined in subdivision two of the preceding section shall be deemed to have accepted and shall be subject to the provisions of this act and of any act amendatory thereof if, at the time of the accident upon which liability is claimed:

“1. The employer charged with such liability is subject to the provisions of this act, whether the employé has actual notice thereof or not; and

“2. Such employé shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of this act; or, in the event that such contract of hire was made before such employer became subject to the provisions of this act, such employé shall have given to his employer notice in writing that he elects not to be subject to such provisions, or without giving either of such notices shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act. An employé who has given notice to his employer in writing as aforesaid that he elects not to be subject to the provisions of this act, may waive such claim by a notice in writing, which shall take effect five days after it is delivered to the employer or his agent.”

“Part II, § 2. If the employé is injured by reason of his intentional and willful misconduct, he shall not receive compensation under the provisions of this Act.”

“Part II, § 14. If an injured employé is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian

or next friend may in his behalf claim and exercise such right or privilege."

As to the method of payment, which an employer must specify in his notice accepting the compensation principle see Part IV, §§ 1-4, Chapter XXVII, *post*, page 505.

"Part VI, § 4. The provisions of this act shall apply to employers and workmen engaged in intrastate commerce, and also to those engaged in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this State, may, subject to the approval of the industrial accident board, and so far as not forbidden by any act of congress, voluntarily accept and become bound by the provisions of this act in like manner and with the same force and effect in all respects as is hereinbefore provided for other employers and their workmen."

NEVADA

(L. 1911, c. 183)

"§ 1. If in any employment to which this act applies personal injury disabling a workman from his regular service for more than ten days, or death by accident, arising out of and in the course of employment is caused to a workman, the workman so injured, or in case of death, the member of his family, as hereinafter

Nevada

defined, shall be entitled to receive from his employer, and the said employer shall be liable to pay, the compensation provided for in this act; *provided*, that recovery hereunder shall not be barred where such employé may have been guilty of contributory negligence where such contributory negligence is slight and that of the employer is gross in comparison, but in which event the compensation may be diminished in proportion to the amount of negligence attributable to such employé, and it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury; and it shall not be a defense: (1) That the employé either expressly or impliedly assumed the risk of the hazard complained of; (2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant. No contract, rule or regulation shall exempt the employer from any of the provisions of the preceding section of this act.

“§ 2. ‘Employer’ includes any body of persons corporate or incorporate and the legal personal representative of a deceased employer. ‘Workman’ includes every person who is engaged in an employment to which this act applies, whether by way of manual labor or otherwise, and where his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependents or other person to whom compensation is payable. ‘Dependents’ means wife, father, mother, husband, sister, brother, child or grandchild; *provided*, that they were

wholly or partly dependent upon the earnings of the workman at the time of his death.

"§ 3. This act shall apply to workmen engaged in manual or mechanical labor in the following employments within this State, each of which is hereby determined to be especially dangerous, in which from the nature, condition or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessarily or substantially unavoidable, and to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

"(a) The erection or demolition of any bridge or building in which there is, or in which the plans or specifications require iron or steel framework;

"(b) The operation of elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge or building for the conveying of material in connection with the erection or demolition of such bridge or building;

"(c) Works on scaffolds of any kind elevated twenty feet or more above the ground, water or floor beneath, in the erection, construction, painting, alteration or repair of buildings, bridges or structures;

"(d) Construction, operation, alteration, or repair of wires, cables, switchboards or apparatus charged with electric current;

"(e) The operation on railroads of locomotives, engines, trains, motors or cars propelled by gravity, steam, electricity or other mechanical power, or the construction or repairs of railroad tracks and roadbeds over which such locomotives, engines, trains, motors, or cars are operated;

"(f) Construction, operation, alteration, or repairs of locomotives, engines, trains, motors or cars in or

New Hampshire

about the shops, round-houses, or other places, where the same is done;

“(g) Construction, operation, alteration or repairs to mills, smelters or mines, including every shaft or pit in the course of being sunk, and every crosscut, drift, station, winze, level or inclined planes through which workmen pass to and from work, and all works, machinery, tramways, ladders or passages, both below ground and above ground, in and adjacent to any mine;

“(h) All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry;

“(i) The construction of tunnels. The employers to whom this act shall apply shall be any person or persons, association, such industry as aforesaid.”

NEW HAMPSHIRE

(L. 1911, c. 000)

“§ 1. This act shall apply only to workmen engaged in manual or mechanical labor in the employments described in this section, which, from the nature, conditions or means of prosecution of such work, are dangerous to the life and limb of workmen engaged therein, because in them the risks of employment and the danger of injury caused by fellow servants are great and difficult to avoid.

“(a) The operation on steam or electric railroads of locomotives, engines, trains or cars, or the construction, alteration, maintenance or repair of steam railroad tracks or roadbeds over which such locomotives, engines, trains or cars are or are to be operated.

“(b) Work in any shop, mill, factory or other place

on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor.

“(c) The construction, operation, alteration or repair of wires or lines of wires, cables, switch boards or apparatus, charged with electric currents.

“(d) All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry, or to any steam boiler owned or operated by the employer, provided injury is occasioned by the explosion of any such boiler or explosive.

“(e) Work in or about any quarry, mine or foundry.

“As to each of said employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

“§ 2. If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment is caused to any workman employed therein, in whole or in part, by failure of the employer to comply with any statute, or with any order made under authority of law, or by the negligence of the employer or any of his or its officers, agents or employés, or by reason of any defect or insufficiency due to his, its or their negligence in the condition of his or its plant, ways, works, machinery, cars, engines, equipment, or appliances, then such employer shall be liable to such workman for all damages occasioned to him, or, in case of his death, to his personal representatives for all damages now recoverable under the provisions of Chap. 191 of the Public Statutes.¹ The workman shall not be held to have

¹ See provisions, c. 191, Pub. Stat.

New Hampshire

assumed the risk of any injury due to any cause specified in this section; but there shall be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed.¹ The damages provided for by this section shall be recovered in an action on the case for negligence."

"§ 3. The provisions of section 2 of this act shall not apply to any employer who shall have filed with the Commissioner of Labor his declaration in writing that he accepts the provisions of this act as contained in the succeeding sections, and shall have satisfied the Commissioner of Labor of his financial ability to comply with its provision, or shall have filed with the Commissioner of Labor a bond, in such form and amount as the Commissioner may prescribe, conditioned on the discharge by such employer of all liability incurred under this act. Such bond shall be enforced by the Commissioner of Labor for the benefit of all persons to whom such employer may become liable under this act in the same manner as probate bonds are enforced. The Commissioner may, from time to time, order the filing of new bonds, when in his judgment such bonds are necessary; and after thirty days from the communication of such order to any employer, such employer shall be subject to the provisions of section 2 of this act, until such order has been complied with. The employer may at any time revoke his acceptance of the provisions of the succeeding sections of this act, by filing with the Commissioner of Labor a declaration to that effect,

¹The New Hampshire statute specifically preserves the defense of contributory negligence. But such negligence must be proved by a preponderance of the evidence. This is to all intents and purposes making contributory negligence an affirmative defense.

and by posting copies of such declaration in conspicuous places about the place where his workmen are employed. Any person aggrieved by any decision of the Commissioner under this section may apply by petition to any Justice of the Superior Court for a review of such decision and said Justice on notice and hearing shall make such order affirming, reversing or modifying such decision as justice may require; and such order shall be final.

"Such employer shall be liable to all workmen engaged in any of the employments specified in section 1,¹ for any injury arising out of and in the course of their employment, in the manner provided in the following sections of this act.

"Provided, That the employer shall not be liable in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed, and,

"Provided, That the employer shall not be liable in respect to any injury to the workman which is caused in whole or in part by the intoxication, violation of law or serious or willful misconduct of the workman.

"Provided, further, That the employer shall at the election of the workman, or his personal representative, be liable under the provisions of section 2 of this act for all injury caused in whole or in part by willful failure of the employer to comply with any statute, or with any order made under authority of law."

NEW JERSEY

(L. 1911, c. 95)

To avoid the constitutional question which is feared in these acts and which is discussed in the case of

¹ See *ante*, page 153.

New Jersey

Ives v. South Buffalo Ry. Co., 201 N. Y. 271, the New Jersey legislature adopted an elective principle which has been followed largely in other States. That is, both employer and employé are presumed to have elected to have waived their common-law rights of actions and defenses, unless they have entered into a contract to the contrary or unless either has given a notice in writing that he will not be bound by the provisions of the Compensation Act. New Jersey seems to have been the first State to have grasped and utilized this principle as a possible escape from the constitutional question raised in the *Ives* case.

“SECTION II

“ELECTIVE COMPENSATION

“7. *Compensation under agreement. Exceptions.* When employer and employé shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employé by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.

“§ II, 8. *Agreement deemed surrender of rights to other method.* Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of sec-

tion II of this act, and shall bind the employé himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.¹

“§ 9. *Employment subject to this act.* Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby. In the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

“§ 10. *Termination of contract.* The contract for the operation of the provisions of section II of this act may be terminated by either party upon sixty days' notice in writing prior to any accident.”²

“Chapter 368—Laws of 1911

“A supplement to an act entitled ‘An act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determi-

¹ See § III, paragraph 25, which is discussed in Chapter XXXVII, *post*, page 587, and Chapter I, *ante*, page 29, as to whether or not the common-law right of action is eliminated by this section.

² See following supplemental act, L. 1911, c. 368.

Ohio

nation of liability and compensation thereunder,' approved April 4 one thousand nine hundred and eleven.

"Be it enacted by the Senate and General Assembly of the State of New Jersey:

"1. Every contract of hiring, verbal, written or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply.

"2. This act shall take effect on the fourth day of July next succeeding its passage and approval.

"May 2, 1911. Approved by Governor."

OHIO

(L. 1911, c. 000)

"§ 20-1. *Duties of employers who pay fund.* Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided,¹ for injuries or death of any such employé, wherever occurring, during the period covered by such premiums, provided

¹ This means as provided in § 21-2. See Chapter I, *ante*, page 31. The employé may elect to sue for "damages" when the injury occurs by reason of a willful act on the part of the employer, or the violation of any law or ordinance respecting safety devices.

the injured employé has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employé of his right of action as aforesaid.

"Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employés of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted.

"§ 20-2. *Premiums to be paid.* For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employés in this State, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the State Liability Board of Awards. The said employers for themselves and their employés shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employés in the following proportions, to wit: Ninety per cent of the premium shall be paid by the employer and ten per cent by the employés. Each employer is authorized to deduct from the pay roll of his employés ten per cent of the said premiums for any premium period in

Rhode Island

proportion to the pay roll of such employés; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employé showing the amount which has been deducted and paid into the state insurance fund."

See also § 21-2, reprinted in Chapter I, *ante*, page 31, for the effect on the liability of the employer of willfully inflicting an injury on an employé or of an injury resulting from failure to comply with statutes or ordinance relating to safety devices.

RHODE ISLAND

(L. 1912, c. 000)

"Art. I, § 2. *Exceptions.* The provisions of this act shall not apply to actions to recover damages for personal injuries, or for death resulting from personal injuries, sustained by employés engaged in domestic service or agriculture.

"§ 3. *Exceptions.* The provisions of this act shall not apply to employers who employ five or less workmen or operatives regularly in the same business, but such employers may, by complying with the provisions of section 5 of this Article become subject to the provisions of this Act."

(Section 4 provides that as to the employers who elect to pay compensation his employés shall have no right of action against him for personal injuries at common law or otherwise. See Chapter I.)

"§ 5. *Election, how made.* Such election on the part of the employer shall be made by filing with the commissioner of industrial statistics a written statement to the effect that he accepts the provisions of

this act, and by giving reasonable notice of such election to his workmen by posting and keeping continuously posted copies of such statement in conspicuous places about the place where his workmen are employed, the filing of which statement and the giving of which notice shall operate to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year, each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file with said commissioner a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of this act and shall give reasonable notice to his workmen as above provided. Blank forms of election and withdrawal as herein provided, shall be furnished by said commissioner.

“§ 6. *Election by employé.* An employé of an employer who shall have elected to become subject to the provisions of this act as provided in section 5 of this Article shall be held to have waived his right of action at common law to recover damages for personal injuries, if he shall not have given his employer at the time of his contract of hire notice in writing that he claimed such right, and within ten days thereafter have filed a copy thereof with the commissioner of industrial statistics, or, if the contract of hire was made before the employer so elected, if the employé shall not have given the said notice and filed the same with said commissioner within ten days after notice by the employer, as above provided, of such election; and such waiver shall continue in force for the term of one year, and thereafter without further act on his part,

Rhode Island

for successive terms of one year, each, unless such employé shall at least sixty days prior to the expiration of such first or any succeeding year, file with the said commissioner a notice in writing to the effect that he desires to claim his said right of action at common law and within ten days thereafter shall give notice thereof to his employer. A minor working at an age legally permitted under the laws of this State shall be deemed *sui juris* for the purpose of this act and no other person shall have any cause of action or right to compensation for an injury to such minor employé except as expressly provided in this act; but if said minor shall have a parent living or a guardian, such parent or guardian, as the case may be, may give the notice and file a copy of the same as herein provided by this section, and such notice shall bind the minor in the same manner that adult employés are bound under the provisions of this act. In case no such notice is given, such minor shall be held to have waived his right of action at common law to recover damages for personal injuries. Any employé, or the parent or guardian of any minor employé, who has given notice to the employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after the delivery to the employer or his agent.

“Art. II, § 1. *To whom made.* If an employé who has not given notice of his claim of common-law rights of action or who has given such notice and has waived the same, as provided in section 6 of Article I, receives a personal injury by accident arising out of and in the course of his employment, he shall be paid compensation, as hereinafter provided, by the employer who shall have elected to become subject to the provisions of this act.

Washington

"§ 2. *Willful injury.* No compensation shall be allowed for the injury or death of an employé where it is proved that his injury or death was occasioned by his willful intention to bring about the injury or death of himself or of another, or that the same resulted from his intoxication while on duty."

WASHINGTON

(L. 1911, c. 74)

"§ 2. *Enumeration of extra hazardous works.* There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the State, in the following enumeration, and they are intended to be embraced within the term 'extra hazardous' wherever used in this act, to wit:

"Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works; laundries operated by power; quarries; engineering works; logging, lumbering and ship building operations; logging, street and interurban railroads; buildings being constructed, repaired, moved or demolished; telegraph, telephone, electric light or power plants or lines, steam heating or power plants, steamboats, tugs, ferries and railroads. If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate

Washington

of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4.

“§ 3. *Definitions.* In the sense of this act words employed mean as here stated, to-wit:

“Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern.

“Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control.

“Mill means any plant, premises, room or place where machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers.

“Mine means any mine where coal, clay, ore, mineral, gypsum or rock is dug or mined underground.

“Quarry means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction.

"Engineering work means any work of construction, improvement or alteration or repair of buildings, structures, streets, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals; electric, steam or water power plants; telegraph and telephone plants and lines; electric light or power lines, and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used.

"Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this State in any extra hazardous work.

"Workman means every person in this State, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: *Provided, however,* That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the State for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person

Washington

actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the State may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

“Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the average salary or wage named in such pay roll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman.

“Dependent means any of the following named relatives of a workman whose death results from any injury and who leaves surviving no widow, widower, or child under the age of sixteen years, viz.: invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father, mother, grandfather, grandmother, step-father, step-mother, grandson, granddaughter, step-son, step-daughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident, are dependent, in whole or in part, for their support upon the earnings of the workman. Except where otherwise provided by treaty, aliens, other than father or mother, not residing within the United States at the time of the accident, are not included.

“Beneficiary means a husband, wife, child or dependent of a workman, in whom shall vest a right to receive payment under this act.

“Invalid means one who is physically or mentally incapacitated from earning.

"The word 'child,' as used in this act, includes a posthumous child, a child legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury.

"The words injury or injured, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease."

"§ 6. *Intentional injuries—status of minors.* If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the accident fund. If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman, the widow, widower, child or dependent of the workman shall have the privilege to take under this act and also have cause of action against the employer, as if this act had not been enacted, for any excess of damage over the amount received or receivable under this act.

"A minor working at an age legally permitted under the laws of this State shall be deemed *sui juris* for the purpose of this act, and no other person shall have any cause of action or right to compensation for an injury to such minor workman except as expressly provided in this act, but in the event of a lump sum payment becoming due under this act to such minor workman, the management of the sum shall be within the probate jurisdiction of the courts the same as other property of minors."

"§ 17. *Public and contract work.* Whenever the State, county or any municipal corporation shall en-

Washington

gage in any extra hazardous work in which workmen are employed for wages, this act shall be applicable thereto. The employer's payments into the accident fund shall be made from the treasury of the State, county or municipality. If said work is being done by contract, the pay roll of the contractor and the sub-contractor shall be the basis of computation, and in the case of contract work consuming less than one year in performance the required payment into the accident fund shall be based upon the total pay roll. The contractor and any sub-contractor shall be subject to the provisions of the act, and the State for its general fund, the county or municipal corporation shall be entitled to collect from the contractor the full amount payable to the accident fund, and the contractor, in turn shall be entitled to collect from the sub-contractor his proportionate amount of the payment. The provisions of this section shall apply to all extra hazardous work done by contract, except that in private work the contractor shall be responsible, primarily and directly, to the accident fund for the proper percentage of the total pay roll of the work and the owner of the property affected by the contract shall be surety for such payments. Whenever and so long as, by state law, city charter or municipal ordinance, provision is made for municipal employes injured in the course of employment, such employes shall not be entitled to the benefits of this act and shall not be included in the pay roll of the municipality under this act.

"§ 18. *Interstate commerce.* The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the

United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this State may, with the approval of the department, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium shall be on the basis of the pay roll of the workmen who accept as aforesaid.

“§ 19. *Elective adoption of act.* Any employer and his employes engaged in works not extra hazardous may, by their joint election, filed with the department, accept the provisions of this act, and such acceptances, when approved by the department, shall subject them irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Ninety per cent of the minimum rate specified in section 4 shall be applicable to such case until otherwise provided by law.”

WISCONSIN

(L. 1911, c. 50)

“§ 2394-3. Except as regards employes working in shops or offices of a railroad company, who are within the provisions of subsection 9 of section 1816 of the statutes, as amended by chapter 254 of the laws of 1907, the term ‘employer’ as used in the two preceding sections of this act shall not include any

Wisconsin

railroad company as defined in subsection 7 of said section 1816 as amended, said section 1816 and amendatory acts being continued in force unaffected, except as aforesaid, by the preceding sections of this act.

The Compensation Act of Wisconsin applies to all employers of labor who have elected to come within its provisions, except certain employés of railroads (who are protected under another statute. See § 2394-3, above), casual employés and those whose employment is not in the usual course of the trade, business, profession, or occupation of the employer. See § 2394-7 (2) below, in this chapter.

“§ 2394-4. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employé, and for his death, if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

“1. Where, at the time of the accident, both the employer and employé are subject to the provisions of this act according to the succeeding sections hereof.

“2. Where, at the time of the accident, the employé is performing service growing out of and incidental to his employment.

“3. Where the injury is proximately caused by accident, and is not so caused by willful misconduct.

“And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of this act, and acts amendatory thereof, shall be the exclusive remedy against the employer for such

injury or death; in all other cases the liability of the employer shall be the same as if this and the succeeding sections of this act had not been passed, but shall be subject to the provisions of the preceding sections of this act.

“§ 2394-5. The following shall constitute employers subject to the provisions of this act within the meaning of the preceding section:

“1. The State, and each county, city, town, village, and school district therein.

“2. Every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employé for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.

“§ 2394-6. Such election on the part of the employer shall be made by filing with the industrial accident board, hereinafter provided for, a written statement to the effect that he accepts the provisions of this act, the filing of which statement shall operate, within the meaning of section 2394-5 of this act, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he

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desires to withdraw his election to be subject to the provisions of the act.

“§ 2394-7. The term ‘employé’ as used in section 2394-4 of this act shall be construed to mean:

“1. Every person in the service of the State, or of any county, city, town, village, or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, town, village, or school district therein, provided that one, employed by a contractor, who has contracted with a county, city, town, village, school district, or the State, through its representatives, shall not be considered an employé of the State, county, city, town, village, or school district which made the contract.

“2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the State (who, for the purposes of the next section of this act, shall be considered the same and shall have the same power of contracting as adult employés), but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer.

Casual employé.

Just what is a “casual” employment has been the subject of much discussion and a good deal of confusion. “Casual” means coming without regularity. A laundress who comes once a week or at other “regular” intervals is not a casual employé, because she is employed at regular although infrequent intervals. *Dewhurst v. Mather* (1908), 2 K. B. 754. On the other hand,

a window cleaner to whom a job is given now and then is a casual employé. *Hill v. Begg* (1908), 2 K. B. 802. (See *ante*, page 121, for a further discussion of this point.)

The provision of the British Compensation Act under which the foregoing decisions were made provides as follows:

“‘Workman’ does not include * * * a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer’s trade or business.” Workman’s Compensation Act 1906; Act XIII; 6 Edward VII, c. 58. See Chapter XXXVIII.

“§ 2394-8. Any employé as defined in subsection 1 of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employé as defined in subsection 2 of the preceding section shall be deemed to have accepted and shall, within the meaning of section 2394-4 of this act, be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

“1. The employer charged with such liability is subject to the provisions of this act, whether the employé has actual notice thereof or not; and

“2. Such employé shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of this act; or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employé shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving

either of such notices, shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act."

"§ 2394-29. The board shall cause to be printed and furnished free of charge to any employer or employé such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of every employer who shall file a statement of election under this act, and the date of the filing thereof, and a separate book in which shall be entered and indexed the name of every employer who shall file his notice of withdrawal of such election, and the date of the filing thereof; and books in which shall be recorded all orders and awards made by the board, and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause notice of the fact to be given to his employés, by posting such notice thereof in several conspicuous places in the office, shop, or place of business of the employer, or by publishing, or in such other manner as the board shall deem most effective; and the board shall likewise cause notice to be given of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and notices of withdrawal of election, and of the time of the filing of the same, shall conclusively be imputed to all employés."

CHAPTER III

LIABILITY OF PRINCIPAL CONTRACTOR FOR INJURIES TO WORKMEN OF SUBCONTRACTOR

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1. Introduction.

A majority of the compensation acts of the different States contain provisions relating to the subject of this chapter. Under certain circumstances others than the direct employers of a workman may be held liable for compensation for his injuries. The decisions under the British Act containing somewhat similar provisions will be found useful.

By an agreement entered into between the defendant and one Lovelace, the latter was to keep an airship on exhibition on the defendant's grounds, and pay the wages of the turnstile man who was to be a servant of the defendant corporation. Admission to the inclosure to view the airship was only to be obtained by ticket and the moneys collected daily by the turnstile man were to be paid, one-half to Lovelace, who agreed to pay the persons engaged by him, the defendant receiving the remainder of the receipts. For the purpose of

Introduction

carrying out the agreement Lovelace engaged a lecturer whose duties were to explain the various parts of the airship and the exploits of Lovelace. After the airship had been on exhibition for some time it exploded and the lecturer was so severely burned that he died as a result of the injuries. In a proceeding by the widow of the lecturer for compensation, it was held that the lecturer was not a "workman" within the meaning of § 13 of the Compensation Act of 1906; and even assuming that the lecturer was a workman, his remedy was against Lovelace and not against the defendant. *Waites v. Franco-British Exhibition (Incorporated)* (1909), 2 B. W. C. C. 199.

Two men named Jones and Acocks determined to open a skating rink. They bought an existing iron building and contracted with Howarth to remove it for them to its new position. In the course of the work, a man employed by Howarth was injured and claimed compensation from Jones and Acocks, as principals, within the meaning of § 4 of the Act. It was held that Jones and Acocks were not principals within the meaning of the section mentioned and the application was dismissed. *Skates v. Jones & Co.* (1910), 3 B. W. C. C. 460.

The deceased was a farm laborer who was in the habit of working for different farmers at 2s. 6d. a day, coming and going when and as he wished. He came to work for the respondent at hay harvest in June, 1907, and worked for him until July 4th of that year, when he worked for another farmer for a week; after which he came back and worked for the respondent until October 10th, 1908, except on three days, at different times, when he absented himself without notice, getting

Introduction

no wages for the days when he was away. On the morning of October 12th, 1908, the deceased came to the respondent's house with another laborer of the same kind prepared to work, and was told by the respondent's servant to go to a neighboring farmer, Andrews, who had sent a message to the respondent asking him to lend him a man to help in threshing, to which the respondent had answered that the deceased could go. The deceased therefore went to Andrews, and while threshing met with an accident which caused his death. It was held that the deceased's employment was of a casual nature, that he was a workman within the meaning of § 13 of the Act, but that there was no contract of service between the workman and the respondent at the time of the accident, and therefore dependents were not entitled to compensation from the respondent. *Boswell v. Gilbert* (1909), 2 B. W. C. C. 251.

A municipal corporation being desirous of clearing land of old buildings for the purpose of extending a market advertised for bids to remove the buildings and accepted the proposition of one Todd who offered to remove the buildings and pay £15, provided he could have the bricks in the buildings. This offer was accepted. During the progress of the work a man employed by Todd was killed. It was held that the widow of the deceased could recover compensation from the municipal corporation under §§ 4 and 13 of the Act. *Mulrooney v. Todd and Bradford Corporation* (1908), 100 L. T. 99; 2 B. W. C. C. 191.

Where C purchased some standing timber and contracted with M to fell the timber and M employed his son to help do the work, and the son was injured, it was held that the son could not recover compensation from

Introduction

C as the son of M was not a workman of C's within the meaning of § 4 of the Act. *Marks v. Carne* (1908), 100 L. T. 950; 2 B. W. C. C. 186.

The registered owner of a steam tug chartered her to another. Under the charter-party the owner was bound to provide and pay a crew of two men, including the deceased, and he alone had power to dismiss them. The possession, control and management of the vessel under the charter-party belonged to the person to whom it was chartered. It was held that the owner and not the charterer was the deceased's employer, within the meaning of the Compensation Act. *Mackinnon v. Miller* (1909), 46 Scotch L. R. 299; 2 B. W. C. C. 64.

A shipowner contracted with Williamson for the cleaning of the boilers in one of his vessels. Williamson engaged a number of boiler scalers to do the work, and one of them, Spiers, was injured while so employed. Spiers was subject to the orders of Williamson in the performance of the work, a certain supervision over him and the other workmen being exercised by a foreman in the employment of the shipowner. Spiers received his wages from Williamson, who in turn received the money in installments from the shipowner as desired for payment of the wages. It was held that Spiers was not in the employment of the shipowner and therefore not entitled to compensation from him. *Spiers v. Elderslie Steamship Co.* (1909), 46 Scotch L. R. 893; 2 B. W. C. C. 205. The work of boiler scaling on a ship is not undertaken by the shipowner in the course or for the purposes of his trade or business within the meaning of § 4 of the Workmen's Compensation Act. *Id.*

Introduction

The respondents were owners of a threshing machine which they let out on hire to farmers. They were bound by statute to have three men to attend the machine, two to look after the engine and a third as a road man. At farms the road man acted as assistant in threshing, being paid for this by the farmer and not by the respondents. While engaged in the threshing the applicant, the road man, was injured and claimed compensation from the respondents, who denied liability, stating that the farmer was the employer. The County Court judge held the respondents were the employers. On appeal it was held that the County Court judge had decided a question of fact, and that there was evidence to support his decision. *Reed v. Smith, Wilkinson & Co.* (1910), 3 B. W. C. C. 223.

A farmer arranged with David Walsh for the services of a threshing machine, which was owned by David Walsh's father, it being understood that 25 shillings was the sum to be paid for the use of the machine, and from this the sum of 20 shillings should go to the father of David Walsh. In the course of the work David Walsh's hand got caught in the machine and had to be amputated. It was held that the farmer was not liable to David Walsh under § 4 of the Act. *Walsh v. Hayes* (1909), 43 Irish L. T. 114; 2 B. W. C. C. 202.

A workman was drowned while mooring a ship belonging to the respondents. He was paid by a stevedore who worked for the respondents and other firms. The respondents contended that the workman was employed by the stevedore and not by them. The stevedore gave evidence that the money was paid through him merely for the convenience of the respondents. The County Court judge held that the man was employed directly

Illinois

by the respondents and not by the stevedore. On appeal it was held that this was a question of fact and the court could not interfere, as there was some evidence to support the decision. *Pollard v. Goole and Hull Steam Towing Co.* (1910), 3 B. W. C. C. 360.

CALIFORNIA

(L. 1911, c. 399)

The California Act has no provision relating to this subject.

ILLINOIS

(L. 1911, c. 000)

"§ 20. Any person, firm or corporation who undertakes to do or contracts with others to do, or have done for him, them or it, any work embraced in section 2 of this Act, requiring such dangerous employment of employes in, or about premises where he, they or it, as principal or principals, contract to do such work or any part thereof, and does not require that the compensation provided for in this Act shall be insured to the employé or beneficiary by any such person, firm or corporation undertaking to do such work and any such person, firm or corporation who creates or carries into operation any fraudulent scheme, artifice or device to enable him, them or it to execute such work without such person, firm or corporation being responsible to the employé or beneficiaries entitled to such compensation under the provisions of this Act, such person, firm, or corporation shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for, and be subject to all the provisions of this Act."

KANSAS

(L. 1911, c. 218)

“§ 4. *Subcontracting.* (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed. (b) Where the principal is liable to pay compensation under this section, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workman independently of this section, and shall have a cause of action therefor. (c) Nothing in this section shall be construed as preventing a workman from recovering compensation under this act from the contractor instead of the principal. (d) This section shall not apply to any case where the accident occurred elsewhere than on or in, or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in, or about the execution of

Massachusetts

such work under his control or management. (e) A principal contractor, when sued by a workman of a subcontractor, shall have the right to implead the subcontractor. (f) The principal contractor who pays compensation voluntarily to a workman of a subcontractor shall have the right to recover over against the subcontractor.

“§ 5. *Remedies both against employer and stranger.* Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability against some person other than the employer to pay damages in respect thereof. (a) The workman may take proceedings against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to recover both damages and compensation; and (b) if the workman has recovered compensation under this act, the person by whom the compensation was paid, or any person who has been called on to indemnify him under the section of this act relating to subcontracting, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the workman to recover damages therefor.

MASSACHUSETTS

(L. 1911, c. 751)

“Part III, § 17. If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employes immediately employed by the subscriber, be liable to pay compensation under

Nevada

this act to those employés, the association shall pay to such employés any compensation which would be payable to them under this act if the independent or subcontractor were subscribers. The association, however, shall be entitled to recover indemnity from any other person who would have been liable to such employés independently of this section, and if the association has paid compensation under the terms of this section, it may enforce in the name of the employé, or in its own name and for the benefit of the association, the liability of such other person. This section shall not apply to any contract of an independent or subcontractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the subscriber, nor to any case where the injury occurred elsewhere than on, in, or about the premises on which the contractor has undertaken to execute the work for the subscriber or which are under the control or management of the subscriber."

MICHIGAN

(L. 1912, c. 000)

The Michigan Act contains no provision on this subject.

NEVADA

(L. 1911, c. 183)

"§ 10. If any employer who shall be the principal, enters into a contract with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, the said principal

New Jersey

shall be liable to pay to any workman employed in the execution of the work, any compensation under this act, which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from the principal, then reference to the principal shall be substituted for reference to the employer, except the amount of compensation shall be calculated with reference to the earnings of the workman under the contractor or employer by whom he is immediately employed. Where such principal is liable to pay compensation he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section. Nothing in this section shall be construed as preventing a workman from recovering compensation under this act, from the contractor or subcontractor, instead of the principal; nor shall this section apply in any case where the accident shall occur elsewhere than on or in or about the premises on which the principal has undertaken to execute the work or which are otherwise under his control or management."

NEW HAMPSHIRE

(L. 1911, c. 000)

The New Hampshire Act contains no provisions on this subject.

NEW JERSEY

(L. 1911, c. 95)

"§ I-3. *Contract not to bar liability.* If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract, written or verbal, with a subcontractor to do

Washington

all or any part of such work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer under this act for injury caused to an employé of such contractor or subcontractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and remedied through the negligence of the employer or some one entrusted by him with the duty of seeing that they were in proper condition. This paragraph shall apply only to actions arising under section one."

The foregoing paragraph does not apply to compensation cases, but only to common-law actions under § I of the Act. There is no provision in the New Jersey Act that contractors shall be liable for compensation to the employés of subcontractors.

OHIO

(L. 1911, c. 000)

There is no provision in the Ohio Act on the subject of this chapter.

RHODE ISLAND

(L. 1912, c. 000)

There is no provision on this subject in the Rhode Island Act.

WASHINGTON

(L. 1911, c. 74)

For liability of contractors for payments due by subcontractors on public works, see § 17, reprinted in Chapter II, *ante*, page 168.

Wisconsin

WISCONSIN

(L. 1911, c. 50)

There is no provision in the Wisconsin Act making principal contractors liable to pay compensation to employés of subcontractors.

CHAPTER IV

CONTRACTS EXEMPTING EMPLOYERS FROM OPERATION OF ACT

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1. Introduction.

The provisions of the various acts that no contract exempting the employer from the terms thereof are somewhat anomalous, especially in regard to those statutes in which it is provided that silence on the part of the employer and the employé, raises a presumption that they have *agreed in the contract of service to accept the compensation principle*. In considering the power to annul the statutes by contract the intention of the legislature in each instance should be kept in mind constantly. The lawmaking bodies intended to compel employers to accept compensation by depriving them of their common-law defenses if they failed to do so. They also intended to compel employés to adopt compensation by enacting that the employer's common-law defenses should be restored as to all such employés as refuse to adopt the compensation principle.¹ Naturally

¹ Not all of the compensation acts contain this penalty so far as the employés are concerned. But as a general rule they do so.

Introduction

this plan of coercion was adopted to overcome the constitutional difficulties in the way of enacting a compulsory compensation law. So the legislatures said to the employers and employés alike: You may agree (impliedly) with each other not to adopt the compensation doctrine, but if you do, certain penalties will be inflicted. If the employer forces the agreement, by refusing to accept compensation, his common-law defenses shall be taken away. If, on the other hand, the employé forces the implied agreement by refusing to accept compensation when his employer has already indicated his intention of embracing that doctrine then the employer of such employé shall have restored to him his common-law defenses. The whole subject, as it is worked out in this series of implied agreements, made necessary by the constitutional difficulties in the way of an obligatory compensation law, has produced a condition which is both anomalous and confusing.

Under the British Act it is held that an agreement with an employé who had been injured, containing terms different from those specified in the Act, will not be upheld. *British & South American Steam Navigation Co. v. Neil* (1910), 3 B. W. C. C. 413.

The term "contracting out" is frequently heard in some quarters in connection with compensation acts. It has a restricted meaning, however, and does not include the right generally to annul the Compensation Act by contract between employer and employé. The term merely refers to the right given under the statute of adopting some alternative scheme of compensation which will, in effect, be the same as that provided under the Act. In other words, the employer himself under certain conditions, or a number of employers

Kansas

co-operating can provide a method of compensating his or their employés on a plan which may differ in detail from that provided in the statute but which must be the same in principle. Such plans must invariably have the approval of certain public officials before they become effective. Thus a scheme was certified under the Workman's Compensation Act of 1897 and within six months allowed for recertification under the Act of 1906, an infant who had contracted out of the Act met with an accident. The scale of compensation was not beneficial to the infant. It was held that the infant was not bound by the contract. *Morter v. Great Eastern Ry. Co.* (1908), 2 B. W. C. C. 480.

CALIFORNIA

(L. 1911, c. 399)

No contract, rule or regulation shall exempt the employer from the provisions abolishing the common-law defenses in actions founded on negligence. § 2, Chapter I, *ante*, page 9.

ILLINOIS

(L. 1911, c. 000)

"§ 13. No employé or beneficiary shall have power to waive any of the provisions of this Act in regard to the amount of compensation which may be payable to such employé or beneficiary hereunder."

KANSAS

(L. 1911, c. 218)

There is no provision in the Kansas Act on this subject.

New Jersey

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 20. No agreement by an employé to waive his rights to compensation under this act shall be valid."

MICHIGAN

(L. 1912, c. 000)

"Part II, § 20. No agreement by an employé to waive his rights to compensation under this act shall be valid."

NEVADA

(L. 1911, c. 183)

The employer cannot exempt himself from the section of the statute abolishing common-law defenses. § 1. See Chapter II, *ante*, page 150.

NEW HAMPSHIRE

(L. 1911, c. 000)

The New Hampshire Act contains no provision on this subject.

NEW JERSEY

(L. 1911, c. 95)

Under the New Jersey Act the employer and employé are permitted to annul the Compensation Act as to them by contract or notice, see Chapter II, *ante*, page 157, but of course subject to the penalties noted in the introduction to this chapter.

OHIO

(L. 1911, c. 000)

There is no provision in the Ohio Act on the subject of this chapter.

RHODE ISLAND

(L. 1912, c. 000)

“Art. II, § 22. *No waiver of rights.* No agreement by an employer, except as provided in Article IV, to waive his rights to compensation under this act shall be valid.”

Article IV relates to alternative schemes which must be approved by the Superior Court. See Chapter XXVII.

WASHINGTON

(L. 1911, c. 74)

“§ 11. *Nonwaiver of act by contract.* “No employer or workman shall exempt himself from the burden or waive the benefits of this act by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be *pro tanto* void.”

WISCONSIN

(L. 1911, c. 50)

The employer cannot by contract relieve himself from the provision abolishing the common-law defenses. § 2394-2. See Chapter I, *ante*, page 37.

CHAPTER V

TIME WITHIN WHICH NO COMPENSATION IS ALLOWED, EXCEPT MEDICAL AID

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CALIFORNIA

(L. 1911, c. 399)

Not until the eighth day after the injury. § 8, subd. 2. See Chapter IX, *post*, page 253.

ILLINOIS

(L. 1911, c. 000)

No compensation is allowed during first six working days of disability. Compensation begins on the eighth day. § 5, subd. b. See Chapter IX, *post*, page 256.

KANSAS

(L. 1911, c. 218)

“The employer shall not be liable under this act in respect of any injury which does not disable the workman for the period of at least two weeks from earning full wages at the work at which he is employed.” § 1 (a).

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 4. No compensation shall be paid under this act for any injury which does not incapacitate the employé for a period of at least two weeks from earning full wages, but if incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury."

MICHIGAN

(L. 1912, c. 000).

"Part II, § 3. No compensation shall be paid under this act for any injury which does not incapacitate the employé for a period of at least two weeks from earning full wages, but if incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury: Provided, However, That if such disability continues for eight weeks or longer, such compensation shall be computed from the date of the injury."

NEVADA

(L. 1911, c. 183)

No compensation allowed for first ten days. § 1.
See Chapter II, *ante*, page 150.

NEW HAMPSHIRE

(L. 1911, c. 000)

"§ 3. * * * the employer shall not be liable in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed. * * *"

Rhode Island

Compensation commences at the end of the second week. § 6 (2). See Chapter IX, *post*, page 264.

NEW JERSEY

(L. 1911, c. 95)

"§ II, 13. *No compensation first two weeks.* No compensation shall be allowed for the first two weeks after the injury received, except as provided by paragraph fourteen,¹ nor in any case unless the employer has actual knowledge of the injury or is notified thereof within the period specified in paragraph fifteen."²

OHIO

(L. 1911, c. 000)

"§ 25. No benefit shall be allowed for the first week after the injury is received, except the disbursement provided for in the next two preceding sections."³

RHODE ISLAND

(L. 1912, c. 000)

"Art. II, § 4. *When compensation begins.* No compensation except as provided by section 12 of this Article shall be paid under this act for any injury which does not incapacitate the employé for a period of at least two weeks from earning full wages, but, if

¹ Paragraph fourteen provides for medical and hospital services and medicines for first two weeks not exceeding one hundred dollars in value. See Chapter VI, *post*, page 199.

² Unless the employer has actual notice of the accident notice must be given within thirty days. See Chapter XXI, *post*, page 371.

³ The two preceding sections (23 and 24) relate to first aid medical relief (see Chapter VI, *post*, page 200) and funeral expenses. (See Chapter VII, *post*, page 204.)

Wisconsin

such incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury."

WASHINGTON

(L. 1911, c. 74)

The compensation begins immediately after the injury.

WISCONSIN

(L. 1911, c. 50)

"§ 2394-9 (2). If the accident causes disability, an indemnity which shall be payable as wages on the eighth day after the injured employé leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows," etc

CHAPTER VI

MEDICAL ATTENTION

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CALIFORNIA

(L. 1911, c. 399)

“§ 8. Where liability for compensation under this Act exists the same shall be as provided in the following schedule:

“(1) Such medical and surgical treatment, medicines, medical and surgical supplies, crutches, and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability, but not exceeding ninety days, to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employé in providing the same; provided, however, that the total liability under this subdivision shall not exceed the sum of \$100.00.”

ILLINOIS

(L. 1911, c. 000)

“§ 5. The amount of compensation which the employer who accepts the provisions of this Act shall

Massachusetts

provide and pay for injury to the employé resulting in disability shall be:

"a. Necessary first aid, medical, surgical, and hospital services, also medicine and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of two hundred dollars, also necessary services of a physician or surgeon during such period of disability, unless such employé elects to secure his own physician or surgeon."

Whether medical attention under the above section is limited to two hundred dollars in amount is doubtful. The last part of the section beginning with the word "*also*" seems to indicate that medical attention must be supplied during the entire time of the disability.

KANSAS

(L. 1911, c. 218)

In case of the death of the workman without leaving any dependents the employer must pay "the reasonable expenses of his medical attendance and burial, not exceeding one hundred dollars." § 11 (a) (3).

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 5. During the first two weeks after the injury, the association shall furnish reasonable medicine and hospital services, and medicines when they are needed."

If the injured workman dies without dependents the association shall pay the reasonable expense of the last sickness and burial, which shall not exceed two

New Jersey

hundred dollars. Part II, § 8. See Chapter VII, *post*, page 203.

MICHIGAN

(L. 1912, c. 000)

"Part II, § 4. During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

NEVADA

(L. 1911, c. 183)

Medical expenses in case of death. See Chapter VII, *post*, page 203.

NEW HAMPSHIRE

(L. 1911, c. 000)

In case of death without leaving dependents medical attendance and funeral expenses not to exceed one hundred dollars. § 6 (1) (c). See Chapter VIII, *post*, page 222.

NEW JERSEY

(L. 1911, c. 95)

Expenses of the last sickness and burial not exceeding \$200, where the injury causes death and there are no dependents, must be paid by the employer. § II, subd. 12 (2). See Chapter VIII, *post*, page 223.

"§ II, 14. *Medical and hospital services supplied first two weeks.* During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services and medicines, as and

Wisconsin

when needed, not to exceed one hundred dollars in value, unless the employé refuses to allow them to be furnished by the employer."

OHIO

(L. 1911, c. 000)

"§ 23. *Disbursements for first aid.* The board shall disburse and pay from the fund, for such injury, to such employés, such amounts for medical, nurse and hospital services and medicines, as it may deem proper, not, however, in any case, to exceed the sum of two hundred dollars, in addition to such award to such employé."

RHODE ISLAND

(L. 1912, c. 000)

"Art. II, § 5. *Medical aid.* During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services, and medicines when they are needed, the amount of the charge for such services to be fixed, in case of the failure of the employer and employé to agree, by the superior court."

WASHINGTON

(L. 1911, c. 74)

There is no provision for medical attendance under the Washington Act.

WISCONSIN

(L. 1911, c. 50)

"§ 2394-9. Where liability for compensation under this Act exists, the same shall be as provided in the following schedule:

Wisconsin

“(1). Such medical and surgical treatment, medicines, medical and surgical supplies, crutches, and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability, but not exceeding ninety days, to cure and relieve from the effects of the injury, the same to be provided by the employer; and in case of his neglect or refusal seasonably to do so the employer to be liable for the reasonable expense incurred by or on behalf of the employé in providing the same.”

CHAPTER VII

FUNERAL EXPENSES

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CALIFORNIA

(L. 1911, c. 399)

“§ 8 (3) (d) If the deceased employé leaves no person dependent upon him for support, and the accident approximately causes death, the death benefit shall consist of the reasonable expenses of his burial not exceeding \$100.”

ILLINOIS

(L. 1911, c. 000)

If employé dies without dependents the employer must pay funeral expenses not exceeding \$150. See § 4, c., Chapter VIII, *post*, page 214.

KANSAS

(L. 1911, c. 218)

If the deceased workman leaves no dependents the employer must pay “the reasonable expenses of his medical attendance and burial, not exceeding one hundred dollars.” § 11 (a) (3).

New Hampshire

MASSACHUSETTS

(L. 1911, c. 751)

“Part II, § 8. If the employé leaves no dependents, the association shall pay the reasonable expense of his last sickness and burial, which shall not exceed two hundred dollars.”

MICHIGAN

(L. 1912, c. 000)

“Part II, § 8. If the employé leaves no dependents the employer shall pay, or cause to be paid as herein-after provided, the reasonable expense of his last sickness and burying, which shall not exceed two hundred dollars.”

NEVADA

(L. 1911, c. 183)

“Whatever sum is payable under this section (§ 5, see Chapter VIII, *post*, page 221) in case of death of the injured workman shall be paid to his legal representatives for the benefit of such dependents, and if he leaves no such dependents, then to the public administrator, for the benefit of the person or persons to whom the expenses of medical attendance and burial are due.” § 5, last paragraph.

NEW HAMPSHIRE

(L. 1911, c. 000)

In case of death without leaving dependents medical attention and funeral expenses not exceeding one hundred dollars. § 6 (1) (c). See Chapter VIII, *post*, page 222.

Washington

NEW JERSEY

(L. 1911, c. 95)

Where there are no dependents, the expenses of the last sickness and burial, not exceeding \$200 must be paid by the employer. § 2, subd. 12 (2). See Chapter VIII, *post*, page 223.

OHIO

(L. 1911, c. 000)

“§ 24. *Funeral expenses.* In case death ensues from the injury reasonable funeral expenses, not to exceed one hundred and fifty dollars, shall be paid from the fund, in addition to such award to such employé.”

RHODE ISLAND

(L. 1912, c. 000)

‘Art. II, § 9. *Funeral expenses.* If the employé dies as a result of the injury leaving no dependents at the time of the injury, the employer shall pay, in addition to any compensation provided for in this act the reasonable expense of his last sickness and burial, which shall not exceed two hundred dollars.’

WASHINGTON

(L. 1911, c. 74)

Expenses of burial, not to exceed \$75, shall be paid in all cases of death. § 5 (a). See Chapter VIII, *post*, page 227.

Wisconsin

WISCONSIN

(L. 1911, c. 50)

“§ 2394-9 (3) (*d*). If the deceased employé leaves no person dependent upon him for support, and the accident proximately causes death, the death benefit shall consist of the reasonable expense of his burial, not exceeding \$100.”

CHAPTER VIII

COMPENSATION TO DEPENDENTS FOR DEATH ¹

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¹ See Chapter II for a discussion of the question as to whom the acts apply. See Chapter IX for discussion of manner of arriving at

Suicide while insane from loss of eyesight

1. Introduction.

Probably on no subject is there a greater variety of provisions in the various statutes than on the questions of the amounts and the persons to whom paid in the case of death. Some general rules found in the adjudicated cases doubtless will be found to be helpful in solving the numerous problems which will develop in an interpretation of the various statutes.

The statutes generally fix a method of determining the death benefit payable to dependents by the wages earned by the workman prior to his death and provide in the same manner for determining the amounts payable for permanent or temporary disability. The question of the method of arriving at the "average wages" of the workman is discussed in Chapter IX following.

2. Death not natural or probable consequence of injury.

Where death results from injury dependents can recover although death may not have been the natural or probable consequences of the particular injury. *Dunham v. Clare* (1902), 66 L. T. 751; 4 W. C. C. 102.

3. Suicide while insane from loss of eyesight.

A workman who had previously lost the sight of one eye received injuries to the other in the course of the employment. He became almost blind. In consequence his nervous system broke down and insanity followed. He later committed suicide. His widow applied for compensation and the application was dismissed as irrelevant by the arbitrator. It was held on average wages. See Chapter XVI for a discussion of the question as to who are dependents.

Presumption of death from absence

appeal that, without saying whether or not the claim could eventually be made out, the claimant was entitled to go to proof, and the arbitrator ought not to have dismissed the case as irrelevant upon its face. *Malone v. Cayzer, Irvine & Co.* (1908), 45 Scotch L. R. 351; 1 B. W. C. C. 27.

4. When death occurs after compensation has been paid for a time.¹

An employé in receipt of compensation returned to work and earned more than he did before the accident. Later he died as a result of the injury. It was held that his dependents were entitled to compensation allowed for death, less the sums paid to the workman in his lifetime. *Williams v. Vauxhall Colliery Co.* (1907), 23 T. L. R. 591; 9 W. C. C. 120. Dependents are entitled to compensation, although the deceased may have been in the receipt of weekly payments under the Act. *O'Keefe v. Lovatt* (1901), 4 W. C. C. 109.

5. Illegitimate child.²

Where compensation is awarded to an illegitimate child, it should not be in a sum greater than the deceased could have been compelled by law to pay for the child's support. *Gourlay v. Murray* (1908), 45 Scotch L. R. 577; 1 B. W. C. C. 335.

6. Presumption of death from absence.³

The lapse of twelve months during which a ship has

¹ This subject is dealt with specifically in the various statutes.

² See Chapter XVI as to who are dependents.

³ Most of the States have laws providing for temporary administration on the estates of those who have been absent for a certain length of time without having been heard from. Under the rule

Amount due partial dependent is a question of fact

not been heard from, after which, under § 174 of the British Merchant Shipping Act of 1894, she is deemed to have been lost with all hands, is not a condition precedent to a claim for compensation under the Workmen's Compensation Act, where by the ordinary rules of evidence a seaman would be deemed to have been lost at sea with his ship, an application for compensation may be made, notwithstanding that twelve months have not elapsed from the time when the ship was last heard of. *Maginn v. Carlingford Lough Steamship Co.* (1909), 43 Irish L. T. 123; 2 B. W. C. C. 224.

7. Total dependency of mother on one son when other sons are living.¹

A widow, who had five grown up sons and who were all working miners, lived with one of them, the only unmarried one, and was in fact entirely supported by his earnings at the time of his death. It was held that she was totally dependent upon the earnings of her son, notwithstanding the other sons were able and liable to contribute to her support. *Rintoul v. Dalmeny Oil Co.* (1908), 45 Scotch L. R. 809; 1 B. W. C. C. 340.

8. Amount due partial dependent is a question of fact.²

The amount due to a partial dependent is a question laid down in the case in the text it is not necessary to await the statutory period in all cases even though there is no *direct* evidence of death. There must, however, be common-law evidence which raises a presumption of death from the circumstances disclosed. This is really nothing more than saying that there must be sufficient common-law evidence from which the court can find as a fact that the workman is dead.

¹ See Chapter XVI for a discussion of who are dependents.

² See Chapter XXIV for procedure in determining dependency.

Deducting poor-law relief received by dependent

of fact in each case. *Littleford v. Connell* (1909), 3 B. W. C. C. 1.

9. Compensation for previous injury not included in determining basis of compensation for subsequent injury causing death.

A workman who had been a collier in the respondents' mine was, at the time of his death, employed at light work. He had previously met with an accident in the same employment, and was at the time of the second accident, which proved fatal, receiving the same compensation in addition to the wages for the light work. It was held that the compensation which the deceased workman was receiving could not be taken into account in estimating the earning in the employment. *Gough v. Crawshay Brothers*, 1 B. W. C. C. 374.

10. Deducting wages paid to an assistant in computing compensation.¹

Where a miner was killed it was held that the portion of his wages which he paid to an assistant should be deducted in computing the compensation, but that the cost of the explosives bought by him in the prosecution of the work, should not, under § 2, subsection (d) be deducted, in computing such compensation. *M'Kee v. John S. Stein & Co.* (1909), 47 Scotch L. R. 39; 3 B. W. C. C. 544.

11. Deducting poor-law relief received by dependent.²

The mother of a deceased workman earning £1
Also see Chapter XVI for a discussion of the question of who are dependents.

¹ See Chapter IX for a further discussion of this subject.

² See Chapter IX for further discussion of basis of compensation.

 Death from anæsthetic

weekly claimed compensation as a partial dependent. She was, before and after her son's death, in receipt of poor-law relief of 2 shillings weekly, and received 14 shillings weekly from deceased. It was held that the method of calculating the sum was to award three years' earnings, and then to deduct from that three years at 2 shillings weekly, for the space of three years. *Byles v. Pool and another* (1909), 2 B. W. C. C. 484. .

12. Estoppel by payment of compensation before death of right to deny liability therefor after death.

Where an employer has paid compensation up to the time of the death of a workman under a registered agreement, he is not estopped, after the death of the workman, from contending that the death was due to disease and not to the accident. (House of Lords) *Cleverley & Others v. Gas Light & Coke Co.* (1907), 1 B. W. C. C. 82.

13. Death from anæsthetic administered for the purpose of performing operation.

A workman's hand was caught between two rollers and severely injured. In the ordinary course the hand would have been amputated, but the surgeon endeavored to save the hand by thoroughly cleansing the wound. This being very painful, an anæsthetic was administered, and this operation, which was described as a "bold experiment" was successful, but two months after the first operation, in order to prevent contraction, which would have rendered the hand rigid and practically useless, it became necessary to graft some skin on the hand. This operation being painful, though not dangerous, an anæsthetic was again administered, and

California

the man died under it. It was held that death resulted from the original injury and the widow was entitled to compensation. *Shirt v. The Calico Printers' Ass'n* (1909), 100 L. T. 740; 2 B. W. C. C. 342.

14. Claim for compensation by personal representative of deceased dependent.¹

The right to compensation growing out of the death of a workman passes to the personal representatives of the deceased dependent. *Darlington v. Roscoe & Sons* (1906), 8 W. C. C. 4.

CALIFORNIA

(L. 1911, c. 399)

“§ 8 (3). The death of the injured employé shall not affect the obligation of the employer under subsections (1) and (2) of this section, so far as his liability shall have accrued and become payable at the time of the death, but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability benefits, provided that such death was approximately caused by the accident causing such disability:

“(a) In case the deceased employé leaves a person or persons wholly dependent upon him for support, the death benefit shall be a sum sufficient when added to the benefits which shall, at the time of death, have accrued and become payable under the provisions of subsection (2) of this section to make the total compensation for the injury and death [exclusive of the benefit provided for in subsection (1)], equal to three times his annual average earnings, not less than

¹ See also Chapter XVI, *post*, page 324.

Illinois

\$1,000 nor more than \$5,000, the same to be payable, unless and until the industrial accident board shall otherwise direct in weekly installments corresponding in amount to the weekly earnings of the employé.

“(b) In case the deceased employé leaves no one wholly dependent on him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of three times such average annual earnings of the employé as the annual amount devoted by the deceased to the support of the person or persons so partially dependent upon him for support bears to such average earnings, the same to be payable, unless and until the industrial accident board shall otherwise direct, in weekly installments corresponding to the weekly earnings of the employé; provided, that the total compensation for the injury and death, [exclusive of the benefit provided for in said subsection(1)] shall not exceed three times such average annual earnings.

“(c) In the event that the accident shall have approximately caused permanent disability, either total or partial, and the employé shall die within fifteen years after the date of the accident, liability for the death benefits provided for in said subsections (a) and (b) respectively shall exist only where the accident was the approximate cause of death within said period of fifteen years.”

If no dependents are left funeral expenses not exceeding \$100. See § 8 (3) (d). See Chapter VII, *ante*, page 202.

ILLINOIS

(L. 1911, c. 000)

“§ 4. The amount of compensation which the employer who accepts the provisions of this Act shall pay

for injury to the employee which results in death, shall be:

"a. If the employé leaves any widow, child or children, or parent or other lineal heirs to whose support he had contributed within five years previous to the time of his death, a sum equal to four times the average annual earnings of the employé, but not less in any event than one thousand five hundred dollars, and not more in any event than three thousand five hundred dollars. Any weekly payments, other than necessary medical or surgical fees, shall be deducted in ascertaining such amount payable on death.

"b. If the employé leaves collateral heirs dependent upon his earnings, such a percentage of the sum provided in Section 'a' as the contributions which deceased made to the support of these dependents, bore to his earnings.

"c. If the employé leaves no widow or child or children, parents or lineal or collateral heirs dependent upon his earnings, a sum not to exceed one hundred and fifty dollars for burial expenses.

"d. All compensation provided for in this section to be paid in case injury results in death, shall be paid in installments equal to one-half the average earnings, at the same intervals at which the wages or earnings of the employé were paid while he was living; or if this shall not be feasible, then the installments shall be paid weekly.

"e. The compensation to be paid for injuries which result in death, as provided for in this section, shall be paid to the personal representative of the deceased employé and shall be distributed by such personal representative to the beneficiaries entitled thereto, in accordance with the laws of this State relating to the descent and distribution of personal property."

In case of death after a period of payment for disability see § 5, subdivision *e* (1) in Chapter IX, *post*, page 257.

“§ 6. The basis for computing the compensation provided for in Sections 4 and 5 of this Act shall be as follows:

“*a.* The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year next preceding the injury.

“*b.* Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employé was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

“*c.* The annual earnings if not otherwise determinable shall be regarded as three hundred times the average daily earnings in such computation.

“*d.* If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings, which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average on those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

“*e.* In the case of injured employés who earn either no wage or less than three hundred times the usual

daily wage or earnings of the adult day laborers in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wage.

"*f.* As to employés in employments in which it is the custom to operate for a part of the whole number of working days in each year, such number shall be used instead of three hundred as a basis for computing the annual earnings, provided the minimum number of days which shall be used for the basis of the year's work shall be not less than two hundred.

"*g.* Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employé to cover any special expense entailed on him by the nature of his employment.

"*h.* In computing the compensation to be paid to any employé who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this Act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered.

"§ 7. The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employés in his employment subject to the provisions of this Act, and it shall not be in any way reduced by contributions from employés.

"§ 8. If it is proved that the injury to the employé resulted from his deliberate intention to cause such

Kansas

injury, no compensation with respect to that injury shall be allowed.

KANSAS

(L. 1911, c. 218)

“§ 11. *Amount of compensation.* The amount of compensation under this act shall be, (a) Where death results from injury: (1) If the workman leaves any dependents wholly dependent upon his earnings, an amount equal to three times his earnings for the preceding year but not exceeding thirty-six hundred dollars and not less than twelve hundred dollars, provided, such earnings shall be computed upon the basis of the scale which he received or would have been entitled to receive had he been at work, during the thirty days next preceding the accident; and, if the period of the workman's employment by the said employer had been less than one year, then the amount of his earnings during the said year shall be deemed to be fifty-two times his average weekly earnings during the period of his actual employment under said employer; provided, that the amount of any payments made under this act and any lump sum paid hereunder for such injury from which death may thereafter result shall be deducted from such sum; and provided, however, that if the workman does not leave any dependents, citizens of and residing at the time of the accident in the United States or the Dominion of Canada, the amount of compensation shall not exceed in any case seven hundred and fifty dollars. (2) If the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings, such proportion of the amount payable under the foregoing provisions of this section, as may be

Massachusetts

agreed upon or determined to be proportionate to the injury to the said dependents; and (3) if he leaves no dependents, the reasonable expense of his medical attendance and burial, not exceeding one hundred dollars."

For the rule of compensation, that is, the manner of computing the wages to be made the basis of the award for compensation, see § 12, reprinted in Chapter IX, *post*, page 259.

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 6. If death results from the injury, the association shall pay the dependents of the employé, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week, for a period of three hundred weeks from the date of the injury. If the employé leaves dependents only partly dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employé to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employé before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury."

"Part II, § 12. No savings or insurance of the

Michigan

injured employé, independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than the association be considered in fixing the compensation under this act.

"§ 13. The compensation payable under this act in case of the death of the injured employé shall be paid to his legal representative; or, if he has no legal representative, to his dependents; or, if he leaves no dependents, to the persons to whom payment of the expenses for the last sickness and burial is due. If the payment is made to the legal representative of the deceased employé, it shall be paid by him to the dependents or other persons entitled thereto under this act."

MICHIGAN

(L. 1912, c. 000)

"Part II, § 5. If death results from the injury, the employer shall pay, or cause to be paid, subject, however, to the provisions of section twelve hereof, in one of the methods hereinafter provided, to the dependents of the employé, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week for a period of three hundred weeks from the date of the injury. If the employé leaves dependents only partly dependent upon his earnings for support at the time of his injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employé to such partial dependents bears to the annual earn-

Nevada

ings of the deceased at the time of his injury. When weekly payments have been made to an injured employé before his death the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury."

NEVADA

(L. 1911, c. 183)

"§ 5. The amount of compensation in case death results from injury, or for death accruing within five years as a result of injury, shall be:

"(a) If the workman leave any person or persons who at the time of the accident were wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of two thousand dollars, whichever of these sums is the greater, but not exceeding in any case three thousand dollars; *provided*, that the total sum of any weekly payments made under this act shall be deducted from such sum; and if the period of the workman's employment by the same employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be nine hundred and thirty-six times his average daily earnings during the period of his actual employment under the same employer;

"(b) If the workman leave only person or persons who at the time of the accident were partly dependent upon his earnings, a sum equal to 50 per cent of the amount payable under the foregoing provisions of this section;

"(c) If the workman leave no person at the time of the accident who was dependent upon his earnings,

New Hampshire

the reasonable expenses of his medical attendance and burial, not exceeding in all three hundred dollars.

"Whatever sum is payable under this section in case of death of the injured workman shall be paid to his legal representatives for the benefit of such dependents, and if he leaves no such dependents then to the public administrator, for the benefit of the person or persons to whom the expenses of medical attendance and burial are due."

NEW HAMPSHIRE

(L. 1911, c. 000)

"§ 6 (1) The amount of compensation shall be, in case death results from injury:

"(a) If the workman leaves any widow, children or parents, resident of this State, at the time of his death, then wholly dependent on his earnings, a sum to compensate them for loss, equal to one hundred and fifty times the average weekly earning of such workman when at work on full time during the preceding year during which he shall have been in the employ of the same employer, or if he shall have been in the employment of the same employer for less than a year then one hundred and fifty times his average weekly earnings on full time for such less period. But in no event shall such sum exceed \$3,000. Any weekly payment made under this Act shall be deducted from the sum so fixed.

"(b) If such widow, children or parents at the time of his death are in part only dependent upon his earnings, such proportion of the benefits provided for those wholly dependent as the amount of wage contributed by the deceased to such partial dependents at the time of injury bore to the total wage of the deceased.

New Jersey

"(c) If he leaves no such dependents, the reasonable expenses of his medical attendance and burial, not exceeding one hundred dollars.

"Whatever sum may be determined to be payable under this Act in case of death of the injured workman shall be paid to his legal representative for the benefit of such dependents, or if he leaves no such dependents, for the benefit of the persons to whom the expenses of medical attendance and burial are due."

NEW JERSEY

(L. 1911, c. 95)

"§ 2-12. *Basis of computation in case of death.* In case of death compensation shall be computed but not distributed on the following basis:

"(1) Actual dependents.

"If orphan or orphans, a minimum of twenty-five per centum of wages of deceased, with ten per centum additional for each orphan in excess of two, with a maximum of sixty per centum.

"If widow alone, twenty-five per centum of wages.

"If widow and one child, forty per centum of wages.

"If widow and two children, forty-five per centum of wages.

"If widow and three children, fifty per centum of wages.

"If widow and four children, fifty-five per centum of wages.

"If widow and five children or more, sixty per centum of wages.

"If widow and father or mother, fifty per centum of wages.

"If grandparents, grandchildren, or minor, or

New Jersey

incapacitated brothers or sisters, twenty-five per centum of wages.

"Distribution of compensation in case of death. Compensation in case of death shall be computed on the basis of the foregoing schedule, but shall be distributed according to the laws of this State providing for the distribution of the personal property of an intestate decedent, unless decedent has in fact left a will.

"(2) No dependents.

"Sickness and burial. Expense of last sickness and burial not exceeding two hundred dollars.

"Orphans and minors. In computing compensation to orphans or other children, only those under sixteen years of age shall be included, and only during the period in which they are under that age, at which time payment on account of such child shall cease.

"Weekly compensation. Proviso. Duration. The compensation in case of death shall be subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; *provided*, that if at the time of injury the employé receives wages of less than five dollars per week, then the compensation shall be the full amount of such wages per week. This compensation shall be paid during three hundred weeks.

"Aliens excepted. Compensation under this schedule shall not apply to alien dependents not residents of the United States."

As to whom payments will be ordered by the court to be made in case of dispute, see § II, paragraph 19, of Act, which will be found in Chapter XXIV, *post*, page 428.

OHIO

(L. 1911, c. 000)

“§ 28. *Injuries resulting in death—compensation.*

In case the injury causes death within the period of two years the benefits shall be in the amounts and to the persons following:

“1. If there be no dependents, the disbursements from the insurance fund shall be limited to the expense provided for in sections 23 and 24.¹

“2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent of the average weekly wage, and to continue for the remainder of the period between the date of the death and six years after the date of the injury, and not to amount to more than a maximum of thirty-four hundred dollars, nor less than a minimum of one thousand five hundred dollars.

“3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent of the average weekly wage and to continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-four hundred dollars.”²

“§ 31. *Basis of compensation.* The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

¹ Section 23 provides for first-aid medical attention (see Chapter VI, *ante*, page 200) and § 24 to funeral expenses (see Chapter VII, *ante*, page 204).

² As to who are the dependents to whom benefits are to be paid, see Chapter XVI, *post*, page 329.

Rhode Island

"§ 32. *Future earnings considered.* If it is established that the injured employé was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage."¹

RHODE ISLAND

(L. 1912, c. 888)

"Art. II, § 6. *Injuries resulting in death.* If death results from the injury, the employer shall pay the dependents of the employé wholly dependent upon his earnings for support at the time of his injury a weekly payment equal to one-half his average weekly wages, earnings or salary, but not more than ten dollars nor less than four dollars a week, for a period of three hundred weeks from the date of the injury: *Provided, however,* that, if the dependent of the employé to whom the compensation shall be payable upon his death is the widow of such employé, upon her death the compensation thereafter payable under this act shall be paid to the child or children of the deceased employé, including adopted and stepchildren, under the age of eighteen years, or over said age but physically or mentally incapacitated from earning, dependent upon the widow at the time of her death. In case there is more than one child thus dependent, the compensation shall be divided equally among them. If the employé leaves dependents only partly dependent upon his earnings for support at the time

¹ This feature has been introduced in some of the compensation acts of the various States. Undoubtedly it will be the source of much controversy. An attempt to invoke this principle probably will be made in practically all cases of employés who are killed or suffer permanent disability under the age of about thirty.

of his injury, the employer shall pay such dependents for a period of three hundred weeks from the date of the injury a weekly compensation equal to the same proportion of the weekly payments herein provided for the benefit of persons wholly dependent as the amount contributed annually by the employé to such partial dependents bears to the annual earnings of the deceased at the time of injury. When weekly payments have been made to an injured employé before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury. *Provided, however, that, if the deceased leaves no dependents at the time of the injury, the employer shall not be liable to pay compensation under this act except as specifically provided in section 9 of this Article.*"

For definition of average weekly wage see Chapter IX, *post*, page 267.

"Art. II, § 14. *Deductions from compensation.* No savings or insurance of the injured employé, independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than the employer be considered in fixing the compensation under this act.

"Art. II, § 15. *Compensation—to whom paid.* The compensation payable under this act in case of the death of the injured employé shall be paid to his legal representatives; or, if he has no legal representative, to his dependents entitled thereto, or, if he leaves no such dependents, to the person to whom the expenses for the burial and last sickness are due. If the payment is made to the legal representative of the de-

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ceased employé, it shall be paid by him to the dependents or other persons entitled thereto under this act. All payments of compensation under this act shall cease upon the death of the employé from a cause other than or not induced by the injury for which he is receiving compensation."

As to who are dependents, see Chapter XVI.

"Art. II, § 16. *Minors and mentally incompetent.* In case an injured employé is mentally incompetent, or, where death results from the injury, in case any of his dependents entitled to compensation hereunder are mentally incompetent or minors at the time when any right, privilege or election accrues to him or them under this act, his conservator, guardian, or next friend may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time in this act provided shall run so long as such incompetent or minor has no conservator or guardian."

WASHINGTON

(L. 1911, c. 74)

"§ 5. *Schedule of awards.* Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever."

"COMPENSATION SCHEDULE

"(a) Where death results from the injury the ex-

penses of burial shall be paid in all cases, not to exceed \$75.00 in any case, and

“(1) If the workman leaves a widow or invalid widower, a monthly payment of \$20.00 shall be made throughout the life of the surviving spouse, to cease at the end of the month in which remarriage shall occur; and the surviving spouse shall also receive \$5.00 per month for each child of the deceased under the age of sixteen years at time of the occurrence of the injury until such minor child shall reach the age of sixteen years, but the total monthly payment under this paragraph (1) of subdivision (a) shall not exceed \$35.00. Upon remarriage of a widow she shall receive, once and for all, a lump sum equal to twelve times her monthly allowance, viz.: the sum of \$240, but the monthly payment for the child or children shall continue as before.

“(2) If the workman leaves no wife or husband, but a child or children under the age of sixteen years, a monthly payment of \$10.00 shall be made to each such child until such child shall reach the age of sixteen years, but the total monthly payment shall not exceed \$35.00 and any deficit shall be deducted proportionately among the beneficiaries.

“(3) If the workman leaves no widow, widower, or child under the age of sixteen years, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to fifty per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed \$20.00 per month. If any dependent is under the age of sixteen years at the time of the occurrence of the injury, the payment to such dependent shall

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cease when such dependent shall reach the age of sixteen years. The payment to any dependent shall cease if and when, under the same circumstances, the necessity creating the dependency would have ceased if the injury had not happened.

"If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive \$20.00 per month for each month after his death until the time at which he would have arrived at the age of twenty-one years.

"(4) In the event a surviving spouse receiving monthly payments shall die, leaving a child or children under the age of sixteen years, the sum he or she shall be receiving on account of such child or children shall be thereafter, until such child shall arrive at the age of sixteen years, paid to the child increased 100 per cent, but the total to all children shall not exceed the sum of thirty-five dollars per month."

For provisions in case of the death of a workman, from causes other than the injury, during the period of total disability, see § 5 (c), in Chapter IX, *post*, page 270.

WISCONSIN

(L. 1911, c. 50)

"§ 2394-9 (3). The death of the injured employé shall not affect the obligation of the employer under subsections 1 and 2 of this section, so far as his liability shall have become payable at the time of death; but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:

“(a) In case the deceased employé leaves a person or persons wholly dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of subsection 2 of this section, to make the total compensation for the injury and death (exclusive of the benefit provided for in subsection 1), equal to four times his average annual earnings; the same to be payable, unless and until the board shall direct payment in gross, in weekly installments corresponding in amount to the weekly earnings of the employé.

“(b) In case the deceased employé leaves no one wholly dependent on him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of four times such average annual earnings of the employé as the average annual amount devoted by the deceased to the support of the person or persons so partially dependent on him for support bears to such average annual earnings, the same to be payable, unless and until the board shall direct payment in gross, in weekly installments corresponding in amount to the weekly earnings of the employé; provided that the total compensation for the injury and death (exclusive of the benefit provided for in said subsection 1) shall not exceed four times such average annual earnings.

“(c) Liability for the death benefits provided for in subdivisions (a) and (b) respectively shall only exist where the accident is the proximate cause of death; provided that, if the accident proximately causes permanent total disability, and death ensues from some other cause before disability indemnity ceases, the death benefit shall be the same as though the accident had caused death; and provided further that, if the

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accident proximately causes permanent partial disability and death ensues from some other cause before disability indemnity ceases, liability shall exist for such percentage of the death benefits provided for in said subdivision (a) or (b) (as the case may be), as shall fairly represent the proportionate extent of the impairment of earning capacity caused by such permanent partial disability in the employment in which the employé was working at the time of the accident."

The foregoing section has been the subject of much discussion. The proviso "that if the accident proximately causes permanent total disability, and death ensues *from some other cause* before disability indemnity ceases, the death benefit shall be the same as though the accident had caused death," and the subsequent portion of the section allowing proportionate awards when there is partial disability followed by death *from some other cause*, leaves a broad ground for discussion and interpretation. The result of these provisions is that as soon as a workman is permanently disabled, whether totally or partially, the employer must, if death follows before indemnity payments cease, eventually pay the maximum amounts for such injury. The employer immediately becomes the insurer of the life of the injured employé, up to the time the indemnity payments cease. For if an uninjured employé should die *from some other cause* than an accident incident to his employment the employer would of course not be liable at all. But as soon as an employé is injured then his life becomes of more value, from a compensation standpoint, than one who is not injured.

"§ 2394-10. 1. The weekly earnings referred to

in section 2394-9 shall be one fifty-second of the average annual earnings of the employé; average annual earnings shall not be taken at less than \$375, nor more than \$750, and between said limits shall be arrived at as follows:

“(a) If the injured employé has worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed.

“(b) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employé of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

“(c) In cases where the foregoing methods of arriving at the average annual earnings of the injured employé cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employé, and of other employés of the same or most similar class, working in the same or most similar employment, in the same or a neighboring locality, shall reasonably represent the annual earning capacity of the injured employé at the time of the accident in the employment in which he was working at such time.

“(d) The fact that an employé has suffered a pre-

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vious disability, or received compensation therefor, shall not preclude compensation for a later injury, or for death, but in determining compensation for the later injury, or death, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury, in the employment in which he was working at such time, and shall be arrived at according to, and subject to the limitations of, the previous provisions of this section.

“2. The weekly loss in wages referred to in section 2394-9 shall consist of such percentage of the average weekly earnings of the injured employé, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.”

CHAPTER IX

COMPENSATION FOR TOTAL OR PERMANENT DISABILITY

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1. Classification of disability.

Disability, or incapacity, may be permanent total, permanent partial, temporary total, or temporary partial. Very few of the acts attempt to define the degrees of incapacity or disability. In the Washington statute permanent total disability is defined to mean the loss of both legs or both arms, or one leg and one

Total incapacity; refusal of work

arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation. It is a well-known fact that persons who lose the sight of both eyes not infrequently are able to earn considerable sums in spite of this distressful calamity. The same is true also as to those who have lost one arm and one leg. Some of the statutes provide for payments of specific sums for the loss of a member. Others leave the question of compensation to depend entirely upon the degree of disability or incapacity in any particular case. The decisions cited hereafter deal with the question generally and will doubtless be of material assistance in determining the meaning of the varying provisions of the several statutes.

2. Total incapacity to do regular work.

The claim of a seaman for compensation was referred to a medical referee for report. He certified that the man was fit for light work if he wore a truss, but not fit for work as a seaman, or for lifting. On this certificate the County Court judge awarded compensation on the basis of total incapacity, and this decision was affirmed by the Court of Appeal. *Hendricksen v. Owners of Steamship "Swanhilda"* (1911), 4 B. W. C. C. 233.

3. Total incapacity; refusal of former employers to supply work to injured employé.

A workman with an injury to his knee recovered sufficiently to be able to resume work, but his knee was liable to break down at any time, and did in fact break down. After a considerable time, during which he did

Loss of eye

not receive compensation, he took proceedings, and the County Court judge, on the assumption that his former employers were going to find him work, awarded one penny per week. The former employers refused to find him work and he was unable to obtain any from anyone else owing to his having had an accident, and to the chance of his breaking down. It was held that he was entitled to full compensation. *Thomas v. Fairbairn, Lawson & Co.* (1911), 4 B. W. C. C. 195.

4. Loss of one eye.

The employer of a workman who had lost an eye, and who had been in receipt, first of full, and subsequently of partial compensation, having proposed to terminate the weekly payments, a mutual submission was made to a medical referee under Schedule I (15). The medical referee having reported that the workman was "as fit as any other one-eyed man" to resume work underground, his employers applied to end the compensation as from the date of the medical referee's report. It was held that the miner should be permitted to present proof showing that his wage-earning capacity was not as great in his present condition as it would have been if he had the use of both eyes. *Arnott v. Fife Coal Co.* (1911), 48 Scotch L. R. 828; 4 B. W. C. C. 361.

A miner lost one eye by an accident. The medical referee to whom the matter had been referred, reported that he was fit for work. The employer thereupon made application to have the compensation ended or diminished. At the hearing the workman maintained that since the date of the referee's examination he had lost the use of his other eye owing to the accident, and that he was unfit for his work. The arbitrator found

Removal of eye already blind

that the miner was totally incapacitated but that it was not proved that his blindness in the second eye was due to the effects of the accident, and held that the onus of proving that the supervening incapacity was due to the accident lay upon the miner. The arbitrator diminished the payments. It was held that the onus was upon the miner and had not been discharged. *M'Ghee v. Summerlee Iron Co.* (1911), 48 Scotch L. R. 807; 4 B. W. C. C. 424.

Where a miner in the course of his employment received an injury which made his right eye almost useless and his left eye was already of little use by reason of a disease common to miners it was held that he was entitled to compensation. *Lee v. William Baird & Co.* (1908), 45 Scotch L. R. 717; 1 B. W. C. C. 34.

5. Complete blindness caused to eye of which sight partially destroyed.

A workman had received an injury to his eye ten years before, so that sight was partially destroyed, but he had some use of his eye. While in this condition he was struck in the eye by a horse's tail and inflammation set in. The eye was removed in the hospital. Compensation was awarded on the ground that incapacity for work was caused by the second injury. *Martin v. Barnett* (1910), 3 B. W. C. C. 146.

6. Removal of eye already blind.

As a result of an accident years ago a workman was blind in one eye, but the infirmity was unknown to his employer and he was fully able to work. As a result of a new accident the blind eye had to be removed and the workman could no longer conceal his infirmity. On

Dismissal for misconduct

recovering from the effects of the operation he was entirely unable, owing to the deformity which was now obvious, to obtain work either from his old employer or from anyone else. He claimed that the accident had thus, in effect, incapacitated him for work. The County Court judge held that any incapacity was due to the accident which had blinded the eye years ago and decided that the workman was not entitled to compensation. This decision was affirmed by the Court of Appeal. *Ball v. William Hunt & Sons* (1911), 104 L. T. 327; 4 B. W. C. C. 225. This case was reversed in the House of Lords, but is not yet reported. It was remanded to the County Court to determine the disability.

7. Refusal to undergo surgical operation.¹

Incapacity may none the less result from an injury, should the workman refuse to undergo a surgical operation, which, although attended with risk, would probably be successful. *Rothwell v. Davies* (1903), 5 W. C. C. 141.

8. Dismissal for misconduct of workman suffering from partial permanent disability.

By an accident a workman lost the use of his left eye. His employers, under a registered agreement, made him a weekly payment during incapacity. He resumed work at his former rate of wages, but was subsequently dismissed for alleged misconduct. On application by the employers to review the agreement, the County Court judge reduced the weekly payments to one

¹ See Chapter II, especially the subdivision "Arising out of and in the Course of the Employment."

Nervousness causing incapacity to work

penny, on the ground that the workman had brought about his own dismissal. On appeal to the Court of Appeal it was held, that although, when a workman employed at an adequate rate of wages, vacates his position by reason of his own misconduct, he is not entitled at once to call upon his employers for compensation, yet one act of misconduct does not necessarily deprive him forever of the right to compensation. *W. White and Sons v. Harris* (1910), 4 B. W. C. C. 39.

A workman who was partially incapacitated by an accident which caused an injury of a permanent nature was employed in another capacity where his wages were higher than they had been before the accident. From this employment he was dismissed by reason of his own misconduct. On proceedings for compensation under the Act it was held that the workman's incapacity was due to his own misconduct and he was not entitled to a substantial award. Upon the consent of the employer an award was made of one penny a week for the purpose of allowing the proceedings to stand without being entirely terminated. *Hill v. Ocean Coal Co.* (1909), 3 B. W. C. C. 29.

9. Nervousness causing incapacity to work.¹

Where a personal injury is caused to a workman by accident, his right to claim compensation continues so long as the nervous effects remain, if they produce total or partial incapacity for work. *Eaves v. Blaen-clydach Colliery Co.* (1909), 100 L. T. 747; 2 B. W. C. C. 329.

¹ See Chapter II, especially the subdivisions "What is an Accident," especially pp. 62 *et seq.*, and "Arising out of and in the Course of the Employment."

Nervousness causing incapacity to work

A relief stamper crushed her finger, and after a period of time had physically recovered from her injury, but dreaded to return to her old work for fear she should again injure herself. It was held that the total incapacity for work had ceased and an award of 1*d.* a week was all she was entitled to have. *Pimms v. Pearson* (1909), 2 B. W. C. C. 489.

Although nervousness may be the result of an accident if it is such as an average reasonable man could overcome it is not sufficient ground for compensation. *Turner v. Brooks & Doxey* (1909), 3 B. W. C. C. 22. In the last-mentioned case the workman had suffered an injury of a not very serious nature. He returned for a short time and then went to a convalescent home and after that returned to work and continued in it for a period of eighteen months. Then he complained that because of nervousness due to the accident he was unable to work. The County Court judge denied compensation and this decision was affirmed by the Court of Appeal. Among other things the County Court judge said: "It is one of the most difficult tasks we have in the working of the Act dealing fairly with employers and men, to deal with cases which are partially neurasthenic, and where the man does not desire to go back to work for a variety of reasons which have really nothing much to do with the original accident. I make a finding that the man if he desires further rest can have it at his own risk. I think that the applicant is fit for his work, and that his refusal to continue working is due to nervousness which an average reasonable man would overcome. * * * I cannot help saying that these neurasthenic claims are on the increase. I know that the better class of working men

Nervousness causing incapacity to work

will take the same view that I do of them. They are not good for the general body of the working community at all. It is not good that these neurasthenic cases should be continually up before the country." The Court of Appeal drew a distinction between this decision and the case of *Eaves v. Blaenclydach Colliery Co.* (1909), 2 K. B. 73; 2 B. W. C. C. 329.

An applicant for compensation was working in a loft when a plank on the floor broke and he hurt his leg. As he was unable to walk he was taken to the hospital and was put under a high frequency electrical treatment, which was so efficacious that in five minutes the man seemed to be completely cured and was able to walk about. He was discharged as cured, but when he went back home he became as bad as ever. Again he returned to the hospital and had the electrical treatment administered, with the result that in a few minutes again he was apparently as well as ever. Within a few days after returning home he once more broke down and became as bad as before. The man alleged that he was unable to do any work. A physician giving evidence for the employé said he did not think Osband was malingering. He was suffering from traumatic hysterical paraplegia, and was unfit to do any work. Witness had told the man that a cure might be effected if his house suddenly caught fire, because he would then probably make a rush for the stairs and go down all right. The County Court judge decided that the man was suffering from traumatic hysterical paraplegia, and that it was not an imaginary paralysis, because he was not suffering from any paralysis at all. That his condition was one of hysteria, and, in the opinion of himself and the medical referee the man

Average weekly wages

could not exercise his will to commence work. He was, therefore, entitled to compensation. *Osband v. Tabor* (1912), "The Policy Holder," April 10, 1912, p. 296.

10. "Average weekly wages."

Some of the statutes contain minute directions as to the manner of arriving at the "average" wages or earnings, which are to form the basis of the compensation payments. Others contain no specifications whatsoever on this point.

In the Nevada statute there is a variance from the two methods noted above. The act of the last-mentioned State speaks of the workman's "average weekly earnings in such employment during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer."

It is obvious that the different provisions of the various acts afford much opportunity for judicial construction and interpretation. The cases cited hereinafter show the general rules of construction which have been adopted by the courts under the British and Canadian Compensation Acts.

Intermittent employment due to strikes and other causes. Intervals from work not amounting to a break in the employment should not be excluded in calculating average weekly earnings. If a man has been employed for twelve months, but has taken odd weeks off, the total amount of his earnings should be divided by fifty-two in order to calculate his average weekly earnings. *Keast v. The Barrow Haematite Steel Co.* (1899), 1 W. C. C. 99. If there has been a break in the employment, for example, a strike, during the previous

Average weekly wages

twelve months, the period of calculation in assessing the average weekly earnings is the period of the new employment. The test of whether there has been a break in the employment is whether the relationship of master and servant has been continuous or not; a mere interval in the time the contract of service or work is running is not sufficient. *Jones v. Ocean Coal Co.* (1899), 80 L. T. 582; 1 W. C. C. 94. Where there is a break in the employment, which amounts to a determination of the old employment, the period over which the average weekly earnings should be assessed is that immediately preceding the injury. *Appleby v. The Horseley Co. & Lovatt* (1899), 80 L. T. 853; 1 W. C. C. 103. If a man is away from work for eleven weeks and returns without any fresh engagement, having left his tools on the job, there is evidence of a break in the employment. *Hewlett v. Hepburn*, 2 W. C. C. 123. Where during the twelve months prior to the accident the mills, in which the applicant worked, had been on short time owing to slackness of trade, and the applicant had not always worked a full week, it was held that she was entitled to the average weekly earnings which she had actually earned during the preceding twelve months. *Kelly v. York Street Flax Spinning Co.* (1909), 43 Irish L. T. J. 81; 2 B. W. C. C. 493. In the last-mentioned case it appeared that in previous years the applicant had worked and earned more than she had during the last twelve months, but the larger earnings were not taken into consideration in fixing the compensation.

In ascertaining the average weekly earnings of a workman, the recognized and known incidents of his employment must be taken into consideration. Therefore

Average weekly wages

where the injured workman was retained in the employment during the whole year, but owing to the fact that the work was discontinuous, he could not have worked for more than thirty-six weeks during the twelve months preceding the accident, fourteen weeks having been taken up by stoppages in the ordinary course of work, and two weeks being recognized holidays, and he did not in fact work for more than thirty-three weeks, it was held that the basis of the compensation was $36/52$ of his earnings during the thirty-three weeks he had actually worked. (House of Lords), *Anslow v. Cannock Chase Colliery Co.* (1909), 100 L. T. 786; 2 B. W. C. C. 365. As to the method of arriving at the average weekly earnings of a workman, MOULTON, L. J., said in the case of *Perry v. Wright* (1907), 98 L. T. 327; 1 B. W. C. C. 351, at page 356 of the last-mentioned report:

“The object of the schedule is to arrive at a fair estimate of what the workman was earning at the date of the accident. But to regard this as rigidly determined by the rate at which he was earning remuneration at the precise moment of the accident would be to adopt a principle which would often lead to unfair results. The remuneration which the workman was earning at that particular moment might be abnormally exaggerated or diminished by reason of temporary and exceptional causes which would make it an inaccurate measure of the workman's normal earnings. The legislature, therefore, by the use of the word ‘average’ indicates that the rate of remuneration is to be arrived at by taking into consideration the earnings during an adequate length of time previous and up to the time of the accident for the purpose of obtaining

Average weekly wages

the average remuneration during that period, rightly deeming that this will more fairly represent the rate of remuneration which the workman was then receiving than would any method of estimating the rate of remuneration solely based on the state of circumstances prevailing at the precise moment of the accident." The learned judge then discusses the provisions of the British Compensation Act which are not entirely the same as those found in the acts of the different States, and lays down the principle that where a certain length of time is taken in computing the average wage that the weeks when there was an enforced idleness by reason of holidays or breakage in machinery, ought to be considered as part of the time employed even though the workman did not receive anything for that time and the average wage reduced accordingly.

An employé had worked for the same employer more than twelve months. The total of his wages for the twelve months before the accident were £83, 2s., 1d., but during the year there had been stoppages:

- 1st. In consequence of a canal having burst;
- 2d. During the wake week;
- 3d. By reason of accidents to machinery;
- 4th. On bank holidays.

The arbitrator divided the total sum earned by fifty-two for the purpose of arriving at the average weekly earnings of the workman in question. It was held on appeal that this was error and that the same should have been divided by the number of weeks or parts of weeks actually worked. *Bailey v. Kenworthy* (1906), 1 B. W. C. C. 371.

Adding compensation from all sources, including rent, etc. A stoker on a merchant vessel was also a stoker

in the Naval Reserve and his position in the Naval Reserve entitled him to draw £6 a year. He met with an accident which disabled him from work, and it was held that in estimating the average weekly earnings, the sum which he received as stoker in the Naval Reserve must be added to the wages received by him as a stoker in the merchant service. *Brandy v. Owners of S. S. "Raphael"* (1910), 4 B. W. C. C. 6, aff'd by House of Lords (1911), 4 B. W. C. C. 307.

The remuneration of a ship's steward who was drowned was found by the County Court judge to be £232. He was entitled, in addition, to "extra wages," which, however, only became payable on the happening of certain events, which had in fact happened, and also to profits on the sale of whisky. The employers contended that such extra payments should be taken into consideration and that if they amounted to more than £18 the total remuneration would exceed £250, in which case the dependents would be excluded from the benefits of the Act. The County Court judge declined to take such sums into consideration and awarded compensation. It was held on appeal to the Court of Appeal of England that such extra payments must be taken into consideration and that the case must go back to the County Court judge to ascertain, the best way he could, their value. *Skailles v. Blue Anchor Line* (1910), 4 B. W. C. C. 16.

In estimating the compensation to which the dependents of a workman killed by accident are entitled when such workman has worked continuously for three years for the same employer, no account can be taken of the wages earned by him under concurrent contracts with other employers. *Buckley v. London &*

Average weekly wages

India Docks (1909), 127 L. T. J. 521; 2 B. W. C. C. 327.

The value of clothing received as part of the emoluments of service is part of the workman's (railway guard) earnings. *Great Northern Ry. Co. v. Dawson* (1905), 92 L. T. 145; 7 W. C. C. 114. Where a seaman in claiming compensation added the amount of his wages to the amount it would cost him for food and lodging, and his employers contended that the food did actually cost considerably less than the amount claimed by the seaman, it was held in upholding an award of the County Court judge that the proper amount in this case was the wages plus the actual cost to the employer of the food and lodging. It was stated further that the cost of food and lodging to the employer is not in every case the test of the value of the same to the workman, where compensation is claimed. *Rosenquist v. Bowring & Co.* (1908), 98 L. T. 773; 1 B. W. C. C. 395. Where a seaman receives wages and food as part of his remuneration, the test in ascertaining the amount of his average wages is not what he saved by receiving the food, but what was the actual worth to him of the reasonable food supplied by the employers. *Dothie v. MacAndrew & Co.* (1908), 98 L. T. 495; 1 B. W. C. C. 308. Deductions from wages for articles supplied which are part of the necessary equipment of a workman from part of his earnings. *Abram Coal Co. v. Southern* (1903), 5 W. C. C. 125. Occasional and fixed allowances for board and lodging, when away from home, are included in earnings. *Sharpe v. Midland Ry. Co.* (1903), 88 L. T. 545; 5 W. C. C. 128, *aff'd*, *Midland Ry. Co. v. Sharpe* (1904), 6 W. C. C. 119. Deductions from wages for things

Average weekly wages

supplied to a workman necessary for the performance of his work, for example, lamp oil supplied to a miner, do not reduce the amount of his earnings. *Houghton v. Sutton Heath and Lea Green Collieries Co.* (1900), 3 W. C. C. 173.

The rent of a cottage belonging to the employer and occupied by the workman, may properly be deducted from the amount of compensation awarded under an agreement between the employer and employé. *Brown v. The South Eastern & Chatham Railway Co.'s Managing Committee* (1910), 3 B. W. C. C. 428.

Regular employment at a fixed wage on two fixed nights in each week is continuous employment for the purpose of determining the number of weeks for which the weekly earnings are to be averaged. If, in addition to such fixed wage, other wages are earned from the same employer for irregular and uncertain employment, these wages are not to be taken into account in calculating the average weekly earnings. *Hathaway v. Argus Printing Co.* (1900), 3 W. C. C. 177.

An applicant was injured at a laundry where she earned 7s. a week. She also received from another person 3s. a week for teaching children to play the piano at their own home, where she went for that purpose every Saturday. The County Court judge found that the applicant's arrangement for teaching the piano was not a "contract of service," and that therefore the applicant had not entered into concurrent contracts of service within the meaning of Schedule I (2) (b), and he awarded the applicant compensation on the basis of 7s. a week received for work at the laundry. It was held on appeal that the question

Average weekly wages

whether the applicant, in her arrangement for teaching the piano, was a workman under a contract of service was a question of fact. There is a dictum in the same case that an usher in a private school, or a teacher, or a nursery governess, would, under ordinary circumstances, be entitled to claim the benefit of the Act. *Simmon v. The Heath Laundry Co.* (1910), 102 L. T. 210; 3 B. W. C. C. 200.

"Tips" as part of earnings. In calculating a workman's average weekly earnings, where the evidence is that he habitually received certain tips to the knowledge of his employers it was held that the court was entitled to take these tips into consideration, although they were given for services outside his ordinary employment. *Knott v. Tingle Jacobs & Co.* (1910), 4 B. W. C. C. 55.

A man in respect of whose death compensation was claimed, had been employed as a waiter on a dining car. In addition to his pay and meals he received from the railway company gratuities or tips from passengers averaging from 10s. to 12s. a week. It was held that the tips were part of the earnings of the deceased. *Penn v. Spiers & Pond* (1908), 1 B. W. C. C. 401.

Absence of agreement as to rate of wages. Where no rate of wages has been expressly stipulated for and no payment made, an agreement may be implied for the usual rate of wages for that particular class of work, in that locality at that time. *Jones v. Walker* (1899), 1 W. C. C. 142.

Employment for less than a week. Where a workman has worked less than one week he is only entitled to a moiety of what he has actually earned. *Peers v. Astley and Tyldesley Collieries Co.* (1901), 3 W. C. C. 185.

Average weekly wages

Where a workman has worked for less than one week he is entitled to a moiety of what he would have earned if he had continued to work for the whole week. *Greaves v. Mulliners* (1901), 3 W. C. C. 189. Where a man worked eleven hours one day at the rate of 6d. per hour, and then was injured it was held that the basis of compensation was the actual amount earned and he was awarded one-half of 5s. 6d., or 2s. 9d. per week. *Case v. Colonial Wharves* (1905), 8 W. C. C. 114.

Actual earnings not "usual" wages paid in that employment. The weekly earnings of an injured workman are what he has earned in that employment and not the ordinary standard weekly wage earned by others engaged in a similar occupation. *Bartlett v. Tutton & Sons* (1901), 85 L. T. 531; 4 W. C. C. 133. An arbitrator found that casual shipwrights (though the standard union rate of wages for both permanent and casual shipwrights is the same per day), are not in the same grade as regular shipwrights, and that the average earnings of the former are much less than the latter. He further found that the weekly earnings of a casual shipwright at the place in question, had for the past twelve months, averaged 30s. and gave compensation to the dependents of a casual shipwright on this basis. This ruling was sustained on appeal. *Cain v. Leyland & Co.* (1906), 1 B. W. C. C. 368. Where a workman was paid by the hour and earned £1, 18s. 6d. from December 13 to December 20, and £1, 4s. 6d. from December 20 to December 27 (Christmas week) it was held that the average of the two weeks must be taken in arriving at the basis of compensation. *Faircloth v. Waring & Gillow* (1906), 8 W. C. C. 99.

Average weekly wages

Change in rate of wages during year. The period of employment for assessing average weekly earnings is not affected by a change in the character of the employment and a consequent change in the rate of wages. When during employment for twelve months there has been a change in the rate of wages, the average must be taken on the earnings for the whole twelve months, and not on the earnings at the time of the accident. *Price v. Marsden & Sons* (1899), 80 L. T. 15; 1 W. C. C. 108.

The word "average" in the expression "average weekly earnings" is only applicable where the weekly earnings differ in amount. *Lysons v. Andrew Knowles & Sons*; *Stuart v. Nixon & Bruce* (1901), 3 W. C. C. 1. Fluctuations in the value of labor should be taken into consideration in determining the amount of compensation. *James v. Ocean Coal Co.* (1904), 6 W. C. C. 128.

Basis of compensation when workman employed in different grades. A workman was employed by the same employer for some time as a boilermaker and for some time as a laborer, and he met with an accident when employed as a laborer. The arbitrator, in calculating his average weekly earnings took into account the amount which the workman had earned as a boilermaker and awarded him compensation on the average wage thus ascertained. It was held that the compensation must be based on the wages the workman was earning in the grade of employment in which he met with the accident and that it was error for the arbitrator to reckon the man's wages as a boilermaker. *Babcock & Wilcox v. Young* (1911), 48 Scotch L. R. 298; 4 B. W. C. C. 367. Same principle, *Perry v. Wright* (1908), 98 L. T. 327; 1 B. W. C. C. 351. In the

Average weekly wages

last-mentioned case the principle was established where a man changes from one grade of work to another that "any step up or step down from one grade to another is to be regarded as commencing a fresh employment," in computing the wages upon which compensation is to be based.

An arbitrator found that no definite grades existed among casual dock laborers, but that the men formed themselves into grades of good and bad workmen, the good earning about 30s. a week and the bad about 15s. a week, and that the workman whose compensation was in question belonged to the latter class. On appeal it was held that this was a misdirection as to the meaning of the word "grade." It was held that the word does not involve or depend upon individual characteristics, and that good and bad workmen are not two grades. The case was remitted to an arbitrator to determine whether casual dock laborers form a distinct grade in the hierarchy of labor, and if so what are the average wages of the grade. *Perry v. Wright; Cain v. Leyland & Co.; Bailey v. Kenworthy; Gough v. Crawshay Brothers* (1907), 98 L. T. 327; 1 B. W. C. C. 351.

A workman, after injury for which he was paid compensation, resumed work in a different department, at a lower wage. He was killed in this latter employment, and the compensation was assessed on the wages of the employment in which he was engaged when he was killed. The Court of Appeal held that the question was one of fact for the County Court judge, and as there was evidence to support it, the court could not interfere with the decision. The decision was made on the ground that there had been a break in the continuity of the employment of the workman and compensation

California

was therefore assessed upon the basis of the earnings of the man in the second employment. *Williams v. The Wynnstay Collieries* (1910), 3 B. W. C. C. 473.

In many of the statutes which follow the provisions for permanent and temporary disability have been so intermingled that it has not always been possible to separate them. They are shown as cross references.

CALIFORNIA

(L. 1911, c. 399)

“§ 8 (2). If the accident causes disability, an indemnity which shall be payable as wages on the eighth day after the injured employé leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows:

“(a) If the accident causes total disability, sixty-five per cent of the average weekly earnings during the period of such total disability; provided, that if the disability is such as not only to render the injured employé entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance shall be increased to one hundred per cent of the average weekly earnings.

* * * * *

“(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subsections (a) and (b) respectively.

“(d) Said subsections (a), (b) and (c) shall be subject to the following limitations:

¹ See Chapter X, *post*, page 281, for § 8 (2) (b).

"Aggregate disability indemnity for a single injury shall not exceed three times the average annual earnings of the employé.

"If the period of disability does not last more than one week from the day the employé leaves work as the result of the accident no indemnity whatever shall be recoverable.

"If the period of disability lasts more than one week from the day the employé leaves work as the result of the accident, no indemnity shall be recoverable for the first week of the period of such disability.

"The aggregate disability period shall not, in any event, extend beyond fifteen years from the date of the accident."¹

"§ 9 (1). The weekly earnings referred to in section (8) shall be one fifty-second of the average annual earnings of the employé; average annual earnings shall not be taken at less than \$333.33, nor more than \$1,666.66, and between said limits shall be arrived at as follows:

"(a) If the injured employé has worked in such employment, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned as such employé during the days when so employed.

"(b) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employé of the same class working substantially the whole of such imme-

¹ For limitation on disability benefit in case of death, see Chapter VIII, *ante*, page 212.

California

diately preceding year in the same or a similar employment in the same or a neighboring place shall have earned during the days when so employed.

“(c) In cases where the foregoing methods of arriving at the average annual earnings of the injured employé cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as having regard to the previous earnings of the injured employé, and of other employés of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the average earning capacity of the injured employé at the time of the injury in the employment in which he was working at such time.

“(d) The fact that an employé has suffered a previous disability, or received compensation therefor, shall not preclude him from compensation for a later injury, or for death resulting therefrom, but in determining compensation for the later injury, or death resulting therefrom, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury, and shall be arrived at according to the previous provisions of this section.

“(2) The weekly loss in wages referred to in section 8, shall consist of the difference between the average weekly earnings of the injured employé, computed according to the provisions of this section, and the weekly amount which the injured employé, in the exercise of reasonable diligence, will probably be able to earn, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.”

ILLINOIS

(L. 1911, c. 000)

"§ 5. The amount of compensation which the employer who accepts the provisions of this Act shall provide and pay for injury to the employé resulting in disability shall be:

(Subdivision *a* provides for medical attention. See Chapter VI, *ante*, page 197.)

"*b.* If the period of disability lasts for more than six working days, and such fact is determined by the physician or physicians, as provided in Section 9, compensation equal to one-half of the earnings, but not less than five dollars nor more than twelve dollars per week, beginning on the eighth day of disability, and as long as the disability lasts, or until the amount of compensation paid equals the amount payable as a death benefit.

"*c.* If any employé, by reason of any accident arising out of and in the course of his employment, receive any serious and permanent disfigurement to the hands or face, but which injury does not actually incapacitate the employé from pursuing his usual or customary employment so that it is possible to measure compensation in accordance with the scale of compensation and the methods of computing the same herein provided, such employé shall have the right to resort to the arbitration provisions of this Act for the purpose of determining a reasonable amount of compensation to be paid to such employé, but not to exceed one-quarter ($\frac{1}{4}$) of the amount of his compensation in case of death.

"*d.* If after the injury has been received it shall

Illinois

appear upon medical examination as provided for in Section 9, that the employé has been partially, though permanently incapacitated from pursuing his usual and customary line of employment, he shall receive compensation equal to one-half of the difference between the average amount which he earned before the accident, and the average amount which he is earning, or is able to earn in some suitable employment or business after the accident, if such employment is secured.

"e. In the case of complete disability which renders the employé wholly and permanently incapable of work, compensation for the first eight years after the day the injury was received, equal to fifty per cent of his earnings, but not less than five dollars nor more than twelve dollars per week. If complete disability continues after the payment of a sum equal to the amount of the death benefit or after the expiration of the eight years, then a compensation during life, equal to eight per cent of the death benefit which would have been payable had the accident resulted in death. Such compensation shall not be less than ten dollars per month and shall be payable monthly.

"(1) In case death occurs before the total of the payments made equals the amount payable as a death benefit, as provided in Section 4, Article a, then in case the employé leaves any widow, child or children, or parents, or other lineal heirs, they shall be paid the difference between the compensation for death and the sum of such payment, but in no case shall this sum be less than five hundred dollars.

"(2) In cases of complete disability, after compensation has been paid at the specified rate for a term of at least six months, the employé shall have the privilege of filing a petition in accordance with Arti-

cle *d* of Section 4 of this Act, asking for a lump sum payment of the difference between the sum of the payments received and the compensation to which he was entitled when such permanent disability had been definitely determined. For the purpose of this section, blindness or the total and irrecoverable loss of sight, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent paralysis of the legs or arms, and a fracture of the skull resulting in incurable imbecility or insanity, shall be considered complete and permanent disability: Provided, these specific cases of complete disability shall not, however, be construed as excluding other cases.

“§ 5, *e* (3). In fixing the amount of the disability payments, regard shall be had to any payments, allowance or benefit which the employé may have received from the employer during the period of his incapacity, except the expenses of necessary medical or surgical treatment. In no event, except in cases of complete disability as defined above, shall any weekly payment payable under the compensation plan in this section provided exceed twelve dollars per week, or extend over a period of more than eight years from the date of the accident. In case an injured employé shall be incompetent at the time when any right or privilege accrues to him under the provisions of this Act, a conservator or guardian of the incompetent, appointed pursuant to law, may on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the employé himself had been competent and had claimed or exercised said right or privilege; and no limitations of time by this Act provided, shall run so long

Kansas

as said incompetent employé had no conservator or guardian."

"§ 11. * * * any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this Act relative to compensation for death received in the course of employment. * * *"

KANSAS

(L. 1911, c. 218)

"§ 11 (b). Where total incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, equal to fifty per cent of his average weekly earnings computed as provided in section 12 but in no case less than six dollars per week or more than fifteen dollars per week."

"§ 12. *Rule for compensation.* For the purposes of the provisions of this act relating to 'earnings' and 'average earnings' of a workman, the following rules shall be observed: (a) 'Average earnings' shall be computed in such manner as is best calculated to give the average rate per week at which the workman was being remunerated for the 52 weeks prior to the accident. Provided, that where by reason of the shortness of time during which the workman has been in the employment of his employer, or the casual nature or the terms of the employment, it is impracticable to compute the rate of remuneration, regard shall be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person employed, by a person in the same grade em-

ployed in the same class of employment and in the same district. (b) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his 'earnings' and his 'average earnings' shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident. (c) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by his absence of work due to illness or any other unavoidable cause. (d) Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed upon him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings. (e) In fixing the amount of the payment, allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity. (f) In the case of partial incapacity the payments shall be computed to equal, as closely as possible, fifty per cent of the difference between the amount of the 'average earnings' of the workman before the accident, to be computed as herein provided, and the average amount which he is most probably able to earn in some suitable employment or business after the accident, subject, however, to the limitations hereinbefore provided.

"§ 13. *Payments to the injured workman.* The payments shall be made at the same time, place, and in the same manner as the wages of the workman were payable at the time of the accident, but a judge of any

Massachusetts

district court having jurisdiction upon application of either party may modify such regulation in a particular case as to him may seem just."

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 9. While the incapacity for work resulting from the injury is total, the association shall pay the injured employé a weekly compensation equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor the amount more than three thousand dollars."

"Part II, § 11. In case of the following specified injuries the amounts hereinafter named shall be paid in addition to all other compensations: (a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one foot, or the reduction to one-tenth of normal vision in both eyes with glasses, one-half of the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of one hundred weeks. (b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the reduction to one-tenth of normal vision in either eye with glasses, one-half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of fifty weeks. (c) For the loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, one-half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a

Michigan

week for a period of twenty-five weeks. (d) For the loss by severance of at least one phalange of a finger, thumb, or toe, one-half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twelve weeks." (As am'd by L. 1912, c. 571.)

MICHIGAN

(L. 1912, c. 000)

"Part II, § 1. If an employé who has not given notice of his election not to be subject to the provisions of this act, as provided in part one, section eight, or who has given such notice and has waived the same as hereinbefore provided, receives a personal injury arising out of and in the course of his employment by an employer who is at the time of such injury subject to the provisions of this act, he shall be paid compensation in the manner and to the extent hereinafter provided, or in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined."

* * * * *

"§ 9. While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employé a weekly compensation equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed four thousand dollars."

For loss of hand, foot, arm, leg and other members, see Part II, § 10, Chapter X, *post*, page 283.

Nevada

For manner of computing average weekly wages, see Part II, § 11, Chapter X, *post*, page 285.

NEVADA

(L. 1911, c. 183)

“§ 6. The amount of compensation in case of total or partial disability resulting from injury shall be:

“(a) A weekly payment during the disability, beginning within ten days after the injury, 60 per cent of his average weekly earnings in such employment during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, so long as there is complete disability; and that proportion of the said percentage which the depleted earning capacity for that service bears to the total disability when the injury is only partial, but in no event shall the total of all payments under this act exceed the sum of three thousand dollars.

“(b) In addition to the foregoing payments, if the injured person lose both feet or both hands, or one foot and one hand, or both eyes or one eye and one foot or one hand, he shall receive, during a full period of five years, 40 per cent of his average weekly earnings, or if he lose one foot, one hand or one eye, the additional compensation therefor shall be 15 per cent of his average weekly earnings, the amount of such earnings to be computed in the same manner as the foregoing 60 per cent; *provided*, that in no case shall all the payments received herein exceed in any month the whole wages earned when the injury occurs, nor shall the added percentages continue longer than to make all payments aggregate three thousand dollars.”

NEW HAMPSHIRE

(L. 1911, c. 000)

“§ 6 (2). Where total or partial incapacity for work at any gainful employment results to the workman from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity, subject as herein provided, not exceeding fifty per centum of his average weekly earnings when at work on full time during the preceding year during which he shall have been in the employment of the same employer, or if he shall have been in the employment of the same employer for less than a year, then a weekly payment of not exceeding one-half the average weekly earnings on full time for such less period. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average earnings of the workman before the accident and the average amount he is able to earn thereafter as wages in the same employment or otherwise. In fixing the amount of the weekly payment, regard shall be had to any payment, allowance or benefit which the workman may have received from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in the same employment or otherwise, after the accident, but shall amount to one-half of such difference. In no event shall any compensation paid under this act exceed the damage suffered, nor shall any weekly payment payable under this act in any event exceed ten dollars a week or extend over more than three hundred

Ohio

weeks from the date of the accident. Such payment shall continue for such period of three hundred weeks provided total or partial disability continue during such period. No such payment shall be due or payable for any time prior to the giving of the notice required by Sec. 5 of this act."

NEW JERSEY

(L. 1911, c. 95)

"§ II, (11) (b) *Complete disability. Proviso.* For disability total in character and permanent in quality, fifty per centum of the wages received at the time of injury, subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; *provided*, that if at the time of injury the employé receives wages of less than five dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks."

For provisions relating to permanent partial disability, by loss of member see Chapter X, *post*, page 288.

OHIO

(L. 1911, c. 000)

'§ 27. *Total disability—compensation.* In case of permanent total disability the award shall be 66 2-3% of the average weekly wage, and shall continue until the death of such person so totally disabled, but not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employé's wages were less than five dollars per week, then he shall receive his full wages."

Rhode Island

"§ 31. *Basis of compensation.* The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

"§ 32. *Future earnings considered.* If it is established that the injured employé was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage."¹

RHODE ISLAND

(L. 1912, c. 000)

"Art. II, § 10. *Total incapacity.* While the incapacity for work resulting from the injury is total, the employer shall pay the injured employé a weekly compensation equal to one-half his average weekly wages, earnings or salary, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks from the date of the injury. In the following cases it shall, for the purposes of this section, be conclusively presumed that the injury resulted in permanent total disability, to wit: The total and irrecoverable loss of sight in both eyes, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent and complete paralysis of the legs or arms, and an injury to the skull resulting in incurable imbecility or insanity."

"Art. II, § 12. *Specific injuries.* In case of the following specified injuries the amounts named in this

¹ See note 1 on page 225, in Chapter VIII.

Rhode Island

section shall be paid in addition to all other compensation provided for in this act:

“(a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one foot, or the entire and irrecoverable loss of the sight of both eyes, one-half of the average weekly wages, earnings or salary of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of one hundred weeks.

“(b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the entire and irrecoverable loss of the sight of either eye, one-half the average weekly wages, earnings or salary of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of fifty weeks.

“(c) For the loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, one-half the average weekly wages, earnings or salary of the injured person but not more than ten dollars nor less than four dollars a week, for a period of twenty-five weeks.

“(d) For the loss by severance of at least one phalange of a finger, thumb, or toe, one-half the average weekly wages, earnings or salary of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twelve weeks.”

“§ 13. *Average weekly wage defined.* The ‘average weekly wages, earnings, or salary’ of an injured employé shall be computed as follows:—

“(a) If the injured employé has worked in the same employment in which he was working at the time of the accident, whether for the same employer

or not, during substantially the whole of the year immediately preceding his injury, his 'average weekly wages' shall be three hundred times the average daily wages, earnings or salary which he has earned in such employment during the days when so employed and working the number of hours constituting a full working day in such employment, divided by fifty-two. But where the employé is employed concurrently by two or more employers, for one of whom he works at one time and for another of whom he works at another time, his 'average weekly wages' shall be computed as if the wages, earnings or salary received by him from all such employers were wages, earnings or salary earned in the employment of the employer for whom he was working at the time of the accident.

“(b) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his 'average weekly wages' shall be three hundred times the average daily wages, earnings, or salary which an employé of the same class working substantially the whole of such immediately preceding year in the same or a similar employment, in the same or a neighboring place, has earned in such employment during the days when so employed and working the number of hours constituting a full working day in such employment divided by fifty-two.

“(c) In cases where the foregoing methods of arriving at the 'average weekly wages, earnings, or salary' of the injured employé cannot reasonably and fairly be applied, such 'average weekly wages' shall be taken at such sum as, having regard to the previous wages, earnings or salary of the injured employé, and other employés of the same or most similar

Washington

class, working in the same or most similar employment in the same or a neighboring locality, shall reasonably represent the weekly earning capacity of the injured employé at the time of the accident in the employment in which he was working at such time.

“(d) Where the employer has been accustomed to pay to the employé a sum to cover any special expense incurred by said employé by the nature of his employment, the sum so paid shall not be reckoned as part of the employé’s wages, earnings or salary.

“(e) The fact that an employé has suffered a previous injury, or received compensation therefor, shall not preclude compensation for a later injury or for death; but in determining the compensation for the later injury or death, his ‘average weekly wages’ shall be such sum as will reasonably represent his weekly earning capacity at the time of the later injury, in the employment in which he was working at such time, and shall be arrived at according to, and subject to the limitations of the previous provisions of this section.”

No deductions are to be made from compensation by reason of insurance or other benefits due to the employé. Art. II, § 14. See Chapter VIII, *ante*, p. 226.

Payments to minors and mental incompetents, see Art. II, § 16, Chapter VIII, *ante*, page 227.

WASHINGTON

(L. 1911, c. 74)

“§ 5. (b) Permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation.

"When permanent total disability results from the injury the workman shall receive monthly during the period of such disability:

"(1) If unmarried at the time of the injury, the sum of \$20.00.

"(2) If the workman have a wife or invalid husband, but no child under the age of sixteen years, the sum of \$25.00. If the husband is not an invalid, the monthly payment of \$25.00 shall be reduced to \$15.00.

"(3) If the workman have a wife or husband and a child or children under the age of sixteen years, or, being a widow or widower, have any such child or children, the monthly payment provided in the preceding paragraph shall be increased by five dollars for each such child until such child shall arrive at the age of sixteen years, but the total monthly payment shall not exceed thirty-five dollars.

"(c) If the injured workman die during the period of total disability, whatever the cause of death, leaving a widow, invalid widower or child under the age of sixteen years, the surviving widow or invalid widower shall receive twenty dollars per month until death or remarriage, to be increased five dollars per month for each child under the age of sixteen years until such child shall arrive at the age of sixteen years; but if such child is or shall be without father or mother, such child shall receive ten dollars per month until arriving at the age of sixteen years. The total combined monthly payment under this paragraph shall in no case exceed thirty-five dollars. Upon remarriage the payments on account of a child or children shall continue as before to the child or children.

"(d) When the total disability is only temporary, the schedule of payment contained in paragraphs (1),

Washington

(2) and (3) of the foregoing subdivision (d) shall apply so long as the total disability shall continue, increased 50 per cent for the first six months of such continuance, but in no case shall the increase operate to make the monthly payment exceed sixty per cent of the monthly wage (the daily wage multiplied by twenty-six) the workman was receiving at the time of his injury. As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earnings power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old. No compensation shall be payable out of the accident fund unless the loss of earning power shall exceed five per cent.

* * * * *

“(f) Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of \$1,500.00. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum. If the injured workman be under the age of twenty-one years and unmarried, the parents

Wisconsin

or parent shall also receive a lump sum payment equal to ten per cent of the amount awarded the minor workman.

“(g) Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjusted according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.”

WISCONSIN

(L. 1911, c. 50)

“§ 2394-9 (2). (a) If the accident causes total disability, sixty-five per cent of the average weekly earnings during the period of such total disability; provided that, if the disability is such as not only to render the injured employé entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance after the first ninety days shall be increased to one hundred per cent of the average weekly earnings.

* * * * *

“(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subdivisions (a) and (b), respectively.

“(d) Said subdivisions (a), (b), and (c) shall be subject to the following limitations:

Aggregate disability indemnity for injury to a single employé caused by a single accident shall not

Wisconsin

exceed four times the average annual earnings of such employé.

The aggregate disability period shall not, in any event, extend beyond fifteen years from the date of the accident.

The weekly indemnity due on the eighth day after the employé leaves work as the result of the injury may be withheld until the twenty-ninth day after he so leaves work; if recovery from the disability shall then have occurred, such first weekly indemnity shall not be recoverable; if the disability still continues, it shall be added to the weekly indemnity due on said twenty-ninth day and be paid therewith.

If the period of disability does not last more than one week from the day the employé leaves work as the result of the injury no indemnity whatever shall be recoverable."

"§ 3. The death of the injured employé shall not affect the obligation of the employer under subsections 1 and 2 of this section, so far as liability shall have become payable at the time of death; but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:" (For death benefits see Chapter VIII, *ante*, page 229.)

For the manner of arriving at the weekly earnings and the average annual earnings, see § 2394-10 reprinted in Chapter VIII, *ante*, page 231.

CHAPTER X

COMPENSATION FOR PARTIAL OR TEMPORARY DISABILITY

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Convict not entitled to compensation

1. Introduction.

Some of the statutes provide specific sums for permanent partial "disability," such as the loss of a finger, a hand, etc. The term is a misnomer in some instances. For example, the loss of a toe might cause very brief disability. Generally speaking there has been no effort to define partial disability. Undoubtedly many difficult questions will arise under the provisions of the laws printed in this chapter. For example, it has been held that even though a man has suffered an injury which is permanent in character, but earns as much or more than he did before the accident, he does not suffer any disability or incapacity. Although in such cases a nominal award is made sometimes to keep the case open should the disability recur.

The decisions hereafter cited are all applicable to one or more of the acts of the different States.

The manner of arriving at the "average wages" as the basis of compensation is discussed fully in Chapter IX, *ante*, page 242.

2. Pain and suffering not compensated.

The Act does not give compensation in respect of pain and suffering. Where a workman is in receipt of the same amount of wages as he earned before the accident, he cannot recover any compensation until such time as he may become incapable of earning that amount. *Irons v. Davis & Timmins* (1899), 80 L. T. 673; 1 W. C. C. 26.

3. Convict not entitled to compensation.

A workman receiving compensation who is sentenced to prison is not entitled to such compensation

while in prison. *Clayton and Shuttleworth v. Dobbs* (1908), 2 B. W. C. C. 488.

4. Ability to do light work after accident; exaggeration of injury.

A workman was injured in a colliery and drew compensation for about four years. It was then alleged he was fit for light work, but he said he could not do it on account of pain. The arbitrator found, as a fact, that the workman was exaggerating and that he could do light work. It was held that there was evidence upon which the arbitrator could so find. *Price v. Burnyeat, Brown & Co.* (1907), 2 B. W. C. C. 337.

5. Ability to earn same wages after as before accident, in another class of work.

An unskilled workman who is able to do other work than that which he was doing before he was injured, is not entitled to compensation merely because he is unable to do such former work. *Cammell, Laird & Co. v. Platt* (1908), 2 B. W. C. C. 368.

6. Reduced earnings owing to general fall in wages.

A workman, who in the course of his employment, met with an accident necessitating the amputation of his right hand, subsequently accepted employment in a different capacity, receiving the same wages he had earned before the accident. Some time later his wages were reduced owing to a general fall in wages, and upon his claim for compensation, it was held that the change in his wages was not attributable to any change in his capacity to earn wages, and therefore he was not entitled to compensation. *Merry & Cuninghame v. Black* (1909), 46 Scotch L. R. 812; 2 B. W. C. C. 372.

Infant, "probable earnings"

7. Workman receiving same wages after as before injury.

If a workman earns after the accident the same amount of wages as he had previously earned, he is not at that time entitled to receive compensation. In such a case the workman is entitled to an award fixing the employer with liability, but the assessment of compensation may be adjourned until such time as the workman suffers loss through disability. *Chandler v. Smith & Son* (1899), 1 W. C. C. 19.

8. Wages and compensation in excess of wages before accident.

Where an injured workman to whom compensation is being paid secures other employment whereby his wages and compensation exceed his wages before the injury the compensation should be reduced so he shares the loss with his employer. *Anley's Executors v. Neale* (1907), 9 W. C. C. 34.

9. Wages and compensation after accident need not equal wages before injury.

An injured workman who had previously earned 32s. 6d. per week, earned 25s. per week after the accident. He claimed 7s. 6d. per week, and the judge awarded him 3s. 9d. He appealed. It was held that there was no misdirection and the judge was not compelled to give the full difference between the earnings before and after the accident. *Humphreys v. City of London Electric Lighting Co.* (1911), 4 B. W. C. C. 275.

10. Infant, "probable earnings."

Where a minor is injured compensation may be

awarded on the theory that he would "probably be earning" higher wages if it were not for the injury. *Edwards v. The Alyn Steel Tinplate Co.* (1910), 3 B. W. C. C. 141.

11. Clumsiness due to injury as ground of incapacity.

A waitress had an injury to her finger, which, becoming stiff, prevented her from working as efficiently as before. She received compensation for some time, and then returned to her old work at her old wages. She could not work as well as she did before, and her employers complained of her clumsiness. She left this work of her own accord, and, without any attempt to find other work, claimed compensation. The County Court judge found that she could not work as well as before, and that she was therefore partially incapacitated, and he awarded her compensation. It was held on appeal that there was evidence to support this finding. *Ward v. Miles* (1911), 4 B. W. C. C. 182.

12. Wages paid seaman under shipping act taken into account in awarding compensation.

A seaman was injured at sea, and eight days later was placed in a hospital at New York, and discharged from the ship. In pursuance of the Merchant Shipping Acts, the shipowners paid him wages in respect of the eight days, maintained him in the hospital, and brought him back to England on his recovery. He claimed compensation from the date of his return to England. The employers asked that accounts should be taken of the wages for the eight days as a payment made by them to the workman during incapacity. The County Court judge held that these wages being paid under a

Deducting hospital fees from compensation

statutory liability, could not be so taken into account. The Court of Appeal reversed its decision. The House of Lords reversed the decision of the Court of Appeal, and held that the wages paid for eight days must be taken into account in fixing the amount of the weekly payments. *McDermott v. Owners of S. S. Tintoretto* (1910), 103 L. T. 769; 4 B. W. C. C. 123.

13. Voluntary idleness of workman as tending to prolong disability.

The judge, who sat with a medical assessor, came to the conclusion that if the workman had taken proper steps to obtain exercise which he ought to have taken more than a year before the hearing, he would have recovered from any disability, and that his present state was due only to want of condition arising from long-continued and unnecessary idleness. Compensation, therefore, was denied. The decision of the County Court judge was sustained on appeal. *Upper Forest and Worcester Steel and Tinplate Co. v. Grey* (1910), 3 B. W. C. C. 424.

14. Deducting hospital fees from compensation.¹

An injured workman was treated at a hospital where the fees were paid by the employers, who claimed that they were entitled to a deduction for the fees so paid. It was held that the payment was clearly a benefit to

¹ Such a question could usually not arise under the statutes of the various States, as they require the employer to furnish medical attention to a limited amount. Of course if the medical fees exceeded the statutory limitation in any case the principle of the case in the text might apply. The British Act does not have any provision for medical attention.

Unsuccessful efforts to obtain employment

the workman within the meaning of Schedule I (3), and the employers could therefore deduct the fees so paid from the compensation. *Suleman v. Owners of the "Ben Lomond"* (1909), 2 B. W. C. C. 499.

15. Vocational diseases; contracted partly in the employment of two employers; apportioning compensation.

Where an industrial disease is contracted by a gradual process, and during the twelve months previous to the incapacity the workman has been employed by two employers, in the absence of any special risk or degree of the poison in either employment, the period of employment by each employer is the basis for calculating the proportion of the compensation which should be paid by each. *Lees v. Waring & Gillow (Ferguson, third party)*, (1909), 2 B. W. C. C. 474.

16. Disability by disease accelerated by accident; basis of compensation.

Where it is proved that apart from accident a disease would have caused incapacity for work on a given day in the future, and that an accident has accelerated the progress of the disease so as to cause present incapacity, the award should limit the time during which compensation is to be paid to the period during which incapacity is caused by the acceleration of the progress of the disease. *Ward v. London and North Western Ry. Co.* (1901), 3 W. C. C. 192.

17. Unsuccessful efforts to obtain employment.

If a man has unsuccessfully made reasonable *bona fide* efforts to obtain employment at work which he is

Kansas

physically capable of performing he is not able to earn anything. *Clark v. Gas Light & Coke Co.* (1905), 7 W. C. C. 119.

CALIFORNIA

(L. 1911, c. 399)

“§ 8 (2) (b) If the accident causes partial disability, sixty-five per cent of the weekly loss in wages during the period of such partial disability.”

For indemnity when disability is at times total and at times partial, see Chapter IX, *ante*, page 253.

For limitation on time of payments see Chapter IX, *ante*, pages 253-4.

For manner of computing amounts payable see Chapter IX, *ante*, page 254.

ILLINOIS

(L. 1911, c. 000)

The provisions of the Illinois Statute for permanent and temporary disability are so interwoven that it is impossible to segregate the different provisions. They will all be found, therefore, in Chapter IX, *ante*, page 256.

KANSAS

(L. 1911, c. 218)

“§ 11. (c) When partial incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, shall not be less than twenty-five per cent, nor exceeding fifty per cent, based upon the average weekly earn-

Massachusetts

ings computed as provided in section 12, but in no case less than three dollars per week or more than twelve dollars per week; provided, however, that if the workman is under twenty-one years of age at the date of the accident and the average weekly earnings are less than \$10.00 his compensation shall not be less than seventy-five per cent of his average earnings. No such payment for total or partial disability shall extend over a period exceeding ten years."

For the rule of compensation; that is, the manner of computing the wages to be made the basis of the award for compensation, see § 12, reprinted in Chapter IX, *ante*, page 259.

"§ 13. *Payments to the injured workman.* The payments shall be made at the same time, place, and in the same manner as the wages of the workman were payable at the time of the accident, but a judge of any district court having jurisdiction upon application of either party may modify such regulation in a particular case as to him may seem just.

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 10. While the incapacity for work resulting from the injury is partial, the association shall pay the injured employé a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury."

Michigan

Certain specified sums are also payable for loss of a leg, an arm, a finger, a toe, etc. Part II, § 11. See Chapter IX, *ante*, page 261.

MICHIGAN

(L. 1912, c. 000)

“Part II, § 10. While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employé a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In cases included by the following schedule the disability in each such case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified therein, to-wit:

“For the loss of a thumb, fifty per centum of the average weekly wages during sixty weeks;

“For the loss of a first finger, commonly called index finger, fifty per centum of average weekly wages during thirty-five weeks;

“For the loss of a second finger, fifty per centum of average weekly wages during thirty weeks;

“For the loss of a third finger, fifty per centum of average weekly wages during twenty weeks;

“For the loss of a fourth finger, commonly called little finger, fifty per centum of average weekly wages during fifteen weeks;

“The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss

Michigan

of one-half of such thumb, or finger, and compensation shall be one-half the amounts above specified;

"The loss of more than one phalange shall be considered as the loss of the entire finger or thumb: Provided, however, That in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand;

"For the loss of a great toe, fifty per centum of average weekly wages during thirty weeks;

"For the loss of one of the toes other than a great toe, fifty per centum of average weekly wages during ten weeks;

"The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and compensation shall be one-half of the amount above specified;

"The loss of more than one phalange shall be considered as the loss of the entire toe;

"For the loss of a hand, fifty per centum of average weekly wages during one hundred and fifty weeks;

"For the loss of an arm, fifty per centum of average weekly wages during two hundred weeks;

"For the loss of a foot, fifty per centum of average weekly wages during one hundred and twenty-five weeks;

"For the loss of a leg, fifty per centum of average weekly wages during one hundred and seventy-five weeks;

"For the loss of an eye, fifty per centum of average weekly wages during one hundred weeks;

"The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of section nine.

"The amounts specified in this clause are all sub-

Michigan

ject to the same limitations as to maximum and minimum as above stated.

“§ 11. The term ‘average weekly wages’ as used in this act is defined to be one fifty-second part of the average annual earnings of the employé. If the injured employé has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed. If the injured employé has not worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employé of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed. In cases where the foregoing methods of arriving at the average annual earnings of the injured employé cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employé, and of other employés of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employé at the time of the accident in the employment in which he was working at such time. The fact that an employé has suffered a previous disability, or received compensation therefor, shall not preclude compensation for a later in-

Michigan

jury, or for death, but in determining compensation for the later injury, or death, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury in the employment in which he was working at such time, and shall be arrived at according to and subject to the limitations of the provisions of this section. The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employé, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury."

"§ 12. The death of the injured employé prior to the expiration of the period within which he would receive such weekly payments shall be deemed to end such disability, and all liability for the remainder of such payments which he would have received in case he had lived shall be terminated, but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:

"If the injury so received by such employé was the proximate cause of his death, and such deceased employé leaves dependents, as hereinbefore specified, wholly or partially dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of this act to such deceased employé, to make the total compensation for the injury and death exclusive of medical and hospital services and medicines furnished

New Hampshire

as provided in section four hereof, equal to the full amount which such dependents would have been entitled to receive under the provisions of section five hereof in case the accident had resulted in immediate death, and such benefits shall be payable in weekly installments in the same manner and subject to the same terms and conditions in all respects as payments made under the provisions of said section five.

“§ 13. No savings or insurance of the injured employé, nor any contribution made by him to any benefit fund or protective association independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided, be considered in fixing the compensation under this act.”

NEVADA

(L. 1911, c. 183)

The provisions of the statute for compensation for total and partial disability are combined in § 6 in such a way as to make segregation impossible. See Chapter IX, *ante*, page 263.

NEW HAMPSHIRE

(L. 1911, c. 000)

Total and partial incapacity are so interwoven in § 6, (2), of the Act that it is impossible to segregate them. See Chapter IX, *ante*, page 264.

NEW JERSEY

(L. 1911, c. 95)

"§ 2. (11). Following is the schedule of compensation:

(a) *Schedule of payments. Temporary disability. Proviso.* For injury producing temporary disability, fifty per centum of the wages received at the time of injury, subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; *provided*, that if at the time of injury the employé receives wages of less than five dollars per week, then he shall receive the full amount of such wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks."

* * * * *

"(c) *Partial disability.* For disability partial in character but permanent in quality, the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit:

"*Thumb.* For the loss of a thumb, fifty per centum of daily wages during sixty days.

"*First finger.* For the loss of a first finger, commonly called index finger, fifty per centum of daily wages during thirty-five weeks.

"*Second finger.* For the loss of a second finger, fifty per centum of daily wages during thirty weeks.

"*Third finger.* For the loss of a third finger, fifty per centum of daily wages during twenty weeks.

"*Fourth finger.* For the loss of a fourth finger,

New Jersey

commonly called little finger, fifty per centum of daily wages during fifteen weeks.

"Phalange. The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one-half of such thumb, or finger, and compensation shall be one-half the amounts above specified.

"More than one phalange. Proviso. The loss of more than one phalange shall be considered as the loss of the entire finger or thumb; *providing, however,* that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

"Great toe. For the loss of a great toe, fifty per centum of daily wages during thirty weeks.

"Other toes. For the loss of one of the toes other than a great toe, fifty per centum of daily wages during ten weeks.

"Phalange of toe. For the loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and compensation shall be one-half of the amount above specified.

"More than one phalange. The loss of more than one phalange shall be considered as the loss of the entire toe.

"Hand. For the loss of a hand, fifty per centum of daily wages during one hundred and fifty weeks.

"Arm. For the loss of an arm, fifty per centum of daily wages during two hundred weeks.

"Foot. For the loss of a foot, fifty per centum of daily wages during one hundred and twenty-five weeks.

"Leg. For the loss of a leg, fifty per centum of daily wages during one hundred and seventy-five weeks.

Ohio

"Eye. For the loss of an eye, fifty per centum of daily wages during one hundred weeks.

"Both hands, etc. The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (b).

"In other cases. In all other cases in this class the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule. Should the employer and employé be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule, the amount of compensation shall be settled according to the provisions of paragraph twenty hereof.

"Maximum and minimum amount. The amounts specified in this clause are all subject to the same limitations as to maximum and minimum as are stated in clause (a)."¹

Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. § III, paragraph 23. See Chapter XVII, *post*, page 340.

OHIO

(L. 1911, c. 000)

"§ 26. Partial disability—compensation. In case of temporary or partial disability, the employé shall

¹ Maximum of \$10 a week and minimum of \$5 a week; provided, that if at the time of the injury the employé receives wages less than \$5 per week then he shall receive the full amount of such wages. See § 2 (11) (a), *ante*, page 288, this chapter.

Rhode Island

receive sixty-six and two-thirds per cent of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employé's wages were less than five dollars per week, then he shall receive his full wages; but not to continue for more than six years from the date of the injury, nor to exceed three thousand four hundred dollars in amount from that injury."

"§ 31. *Basis of compensation.* The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

"§ 32. *Future earnings considered.* If it is established that the injured employé was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage."

RHODE ISLAND

(L. 1912, c. 000)

"Art. II, § 11. *Partial incapacity.* While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employé a weekly compensation equal to one-half the difference between his average weekly wages, earnings or salary, before the injury and the average weekly wages, earnings or salary which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury."

For amount payable for specific injuries, see Chapter IX, *ante*, page 266.

Wisconsin

For definition of average weekly wage, see § 13, Chapter IX, *ante*, page 267.

No deductions are to be made from compensation by reason of insurance or other benefits due to the employé. Art. II, § 14. See Chapter VIII, *ante*, page 226.

Payments to minors and mental incompetents, see Art. II, § 16, Chapter VIII, *ante*, page 227.

WASHINGTON

(L. 1911, c. 74)

The provisions in the Washington Act for permanent, total, temporary and partial disability are so intermingled that it is impossible to segregate them and they are all printed in Chapter IX, *ante*, page 269.

WISCONSIN

(L. 1911, c. 50)

“§ 2394-9 (2) (b) If the accident causes partial disability, sixty-five per cent of the weekly loss in wages during the period of such partial disability.

“(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subdivisions (a) and (b), respectively.

“(d) Said subdivisions (a), (b), and (c) shall be subject to the following limitations:

“Aggregate disability indemnity for injury to a single employé caused by a single accident shall not exceed four times the average annual earnings of such employé.

“The aggregate disability period shall not, in any

Wisconsin

event, extend beyond fifteen years from the date of the accident.

“The weekly indemnity due on the eighth day after the employé leaves work as the result of the injury may be withheld until the twenty-ninth day after he so leaves work; if recovery from the disability shall then have occurred, such first weekly indemnity shall not be recoverable; if the disability still continues, it shall be added to the weekly indemnity due on said twenty-ninth day and be paid therewith.

“If the period of disability does not last more than one week from the day the employé leaves work as the result of the injury no indemnity whatever shall be recoverable.

“3. The death of the injured employé shall not affect the obligation of the employer under subsections 1 and 2 of this section, so far as his liability shall have become payable at the time of death; but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:” (For death benefits see Chapter VIII, *ante*, page 229).

For the manner of arriving at the weekly earnings and the average annual earnings, see § 2394-10, reprinted in Chapter VIII, *ante*, page 231.

CHAPTER XI

COMMUTATION OF AWARD OR AGREED COMPENSATION BY PRESENT PAYMENT OF LUMP SUM, BY ANNUITY OR OTHERWISE ¹

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Most of the statutes contain specific provisions relating to present lump-sum payments in full settlement of any claim for compensation. Each statute must be consulted. The decisions below will be found useful in applying the principles underlying such lump-sum payments.

In arriving at a lump sum to be paid the court should not take the actual value of the compensation based on the man's age and his expectancy of life, but upon a business footing as between employer and employé. *Grant & Aldcroft v. Conroy* (1904), 6 W. C. C. 153.

A workman in receipt of maximum compensation of 17s. 3d. per week, agreed with his employers to receive the sum of £175 to redeem the liability. The judge refused to allow the agreement to be registered, but this decision was overruled on appeal and the agree-

¹ See Chapter XXXV, *post*, page 571, on COMPROMISING CLAIMS AND AWARDS.

Illinois

ment was ordered to be recorded. *O'Neill v. The Anglo-American Oil Co.* (1909), 2 B. W. C. C. 434.

A workman sustained injuries in the course of his employment, whereby he lost his arm. The employer paid compensation for six months and then applied to have the payments redeemed by payment of a lump sum. The arbitrator, without inquiring as to the workman's capacity for work, fixed the amount of the lump sum on the basis of permanent incapacity, and it was held on appeal that the arbitrator had not exceeded his jurisdiction. *National Telephone Co. v. Smith* (1909), 46 Scotch L. R. 988; 2 B. W. C. C. 417.

CALIFORNIA

(L. 1911, c. 399)

The amounts payable under the Act must be paid "in weekly installments," "unless and until the Industrial Accident Board shall otherwise direct." § 8 (3) (a). See Chapter VIII, *ante*, page 212.

But claims arising under the Act may be compromised § 28. See Chapter XXXV, *post*, page 574.

ILLINOIS

(L. 1911, c. 000)

"§ 5½. Any person entitled to compensation under this Act, or any employer who shall be bound to pay compensation under this Act, who shall desire to have such compensation, or any part thereof, paid in a lump sum, may petition any court of competent jurisdiction of the county in which the employé resided or worked at the time of disability or death, asking that such compensation be so paid, and if upon proper no-

Kansas

tice to the interested parties, and a proper showing made before such court, it appears to the best interest of the parties that such compensation be so paid, the court shall order payment of a lump sum, and where necessary, upon proper application being made, a guardian, conservator or administrator, as the case may be, shall be appointed for any person under disability who may be entitled to any such compensation, and an employer bound by the terms of this Act, and liable to pay such compensation, may petition for such appointment where no such legal representatives have been appointed or acting for such party or parties so under disability."

KANSAS

(L. 1911, c. 218)

"§ 14. *Compensation to dependents, etc.* Where death results from the injury and the dependents of the deceased workman as herein defined, have agreed to accept compensation, and the amount of such compensation and the apportionment thereof between them has been agreed to or otherwise determined, the employer may pay such compensation to them accordingly (or to an administrator if one be appointed) and thereupon be discharged from all further liability for the injury. Where only the apportionment of the agreed compensation between the dependents is not agreed to, the employer may pay the amount into any district court having jurisdiction, or to the administrator of the deceased workman, with the same effect. Where the compensation has been so paid into court or to an administrator, the proper court, upon the petition of such administrator or any of such dependents, and upon such notice and proof as it may order

Kansas

shall determine the distribution thereof among such dependents. Where there are no dependents, medical and funeral expenses may be paid and distributed in like manner."

"§ 31. *Judgment upon agreement or award.* At any time after an agreement or award has been filed, the workman may apply to the said district court for judgment against the employer for a lump sum equal to eighty per cent of the amount of payments due and unpaid and prospectively due under the agreement or award; and, unless the agreement or award be stayed, modified or canceled, or the liability thereunder be redeemed or otherwise discharged, the court shall examine the workman under oath, and if satisfied that the application is made because of doubt as to the security of his compensation, shall compute the sum and direct judgment accordingly, as if in an action; provided, that if the employer shall give a good and sufficient bond, approved by the court, no execution shall issue on such judgment so long as the employer continues to make payments in accordance with the original agreement or award undiminished by the discount."

"§ 33. *Redemption of liability.* Where any payment has been continued for not less than six months the liability therefor may be redeemed by the employer by the payment to the workman of a lump sum of an amount equal to eighty per cent of the payments which may become due according to the award, such amount to be determined by agreement, or, in default thereof, upon application, to a judge of a district court having jurisdiction. Upon paying such amount the employer shall be discharged from all further liability on account of the injury, and be entitled to a duly executed release, upon filing which or other due proof

Nevada

of payment, the liability upon any agreement or award shall be discharged of record."

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 22. Whenever any weekly payment has been continued for not less than six months, the liability therefor may in unusual cases be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board."

MICHIGAN

(L. 1912, No. 3)

"Part II, § 22. Whenever any weekly payment has been continued for not less than six months, the liability therefor may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board, and said board may at any time direct in any case, if special circumstances be found which in its judgment require the same, that the deferred payments be commuted on the present worth thereof at five per cent per annum to one or more lump sum payments, and that such payments shall be made by the employer or the insurance company carrying such risk, or commissioner of insurance, as the case may be."

NEVADA

(L. 1911, c. 183)

There is no provision in the Nevada Statute on this subject.

Ohio

NEW HAMPSHIRE

(L. 1911, c. 000)

The court may grant an order for the payment of a lump sum either on the application of the workman or of the employer. § 9, reprinted in Chapter XXIV, *post*, page 427.

NEW JERSEY

(L. 1911, c. 95)

“§ 2-21. *Amount may be commuted.* The amounts payable periodically as compensation may be commuted to one or more lump sum payments by the judge of the court of common pleas having jurisdiction as set forth in the preceding paragraph, upon the application of either party, in his discretion, provided the same be in the interest of justice. Unless so approved, no compensation payments shall be commuted.

“*Agreement or award may be modified.* An agreement or award of compensation may be modified at any time by a subsequent agreement, or at any time after one year from the time when the same became operative it may be reviewed upon the application of either party on the ground that the incapacity of the injured employé has subsequently increased or diminished. In such case the provisions of paragraph seventeen with reference to medical examination shall apply.”

OHIO

(L. 1911, c. 000)

“§ 34. The board, under special circumstances, and when the same is deemed advisable, may commute

Rhode Island

periodical benefits to one or more lump sum payments."

RHODE ISLAND

(Laws 1912, c. 000)

"Art. II, § 25. *Payment of lump sum.* In case payments have continued for not less than six months either party may, upon due notice to the other party, petition the superior court for an order commuting the future payments to a lump sum. Such petition shall be considered by the superior court and may be summarily granted where it is shown to the satisfaction of the court that the payment of a lump sum in lieu of future weekly payments will be for the best interest of the person or persons receiving or dependent upon such compensation, or that the continuance of weekly payments will, as compared with lump sum payments, entail undue expense or undue hardship upon the employer liable therefor, or that the person entitled to compensation has removed or is about to remove from the United States. Where the commutation is ordered the superior court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests. Upon paying such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which, or other due proof of payment, the liability of such employer under any agreement, award, findings, or decree shall be discharged of record."

Washington

WASHINGTON

(L. 1911, c. 74)

"§ 5 (j). If a beneficiary shall reside or remove out of the State the department may, in its discretion, convert any monthly payments provided for such case into a lump sum payment (not in any case to exceed \$4,000.00) upon the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20.00 to a person thirty years of age is worth \$4,000.00, or, with the consent of the beneficiary, for a smaller sum.

"(k) Any court review under this section shall be initiated in the county where the workman resides or resided at the time of the injury, or in which the injury occurred."

"§ 7. *Conversion into lump sum payment.* In case of death or permanent total disability the monthly payment provided may be converted, in whole or in part, into a lump sum payment (not in any case to exceed \$4,000.00), on the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20.00 to a person thirty years of age is worth the sum of \$4,000.00, in which event the monthly payment shall cease in whole or in part accordingly or proportionately. Such conversion may only be made after the happening of the injury and upon the written application of the beneficiary (in case of minor children, the application may be by either parent) to the department, and shall rest in the discretion of the department. Within the rule aforesaid the amount and value of the lump sum payment may be agreed upon between the department and the beneficiary."

WISCONSIN

(L. 1911, c. 50)

"§ 2394-28. Any employer against whom liability may exist for compensation under this act may, with the approval of the industrial accident board, be relieved therefrom by:

"1. Depositing the present value of the total unpaid compensation for which such liability exists, assuming interest at three per centum per annum, with such trust company of this State as shall be designated by the employé (or by his dependents, in case of his death, and such liability exists in their favor), or in default of such designation by him (or them) after ten days' notice in writing from the employer, with such trust company of this State as shall be designated by the board; or

"2. By the purchase of an annuity, within the limitations provided by law, in any insurance company granting annuities and licensed in this State, which may be designated by the employé, or his dependents, or the board, as provided in subsection 1 of this section."

CHAPTER XII

DEFINITION OF PERMANENT DISABILITY

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CALIFORNIA

(L. 1911, c. 399)

There is no definition of permanent or total disability in the California Act.

ILLINOIS

(L. 1911, c. 000)

No definition. See Chapter IX, *ante*, page 256.

KANSAS

(L. 1911, c. 218)

The Kansas Act contains no definition.

MASSACHUSETTS

(L. 1911, c. 751)

There is no definition in the Act.

Rhode Island

MICHIGAN

(L. 1912, No. 3)

The Michigan Act contains no definition.

NEVADA

(L. 1911, c. 183)

See § 6, in Chapter IX, *ante*, page 263.

NEW HAMPSHIRE

(L. 1911, c. 000)

There is no definition in the New Hampshire Act.

NEW JERSEY

(L. 1911, c. 95)

See Chapters IX (*ante*, page 265) and X (*ante*, page 288).

OHIO

(L. 1911, c. 000)

The Ohio Act contains no definition of permanent liability.

RHODE ISLAND

(L. 1912, c. 000)

There are specific benefits for particular injuries of a permanent character (Art. II, § 12, Chapter IX) and a definition of permanent total disability in Art. II, § 10. See Chapter IX, *ante*, page 266.

Wisconsin

WASHINGTON

(L. 1911, c. 74)

See § 5, in Chapter IX, *ante*, page 269.

WISCONSIN

(L. 1911, c. 50)

There is no definition of permanent or total disability in the Statute.

CHAPTER XIII

DEFINITION OF TEMPORARY TOTAL DISABILITY

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CALIFORNIA

(L. 1911, c. 399)

There is no definition of temporary or partial disability in the California Act.

ILLINOIS

(L. 1911, c. 000)

No definition. See Chapter IX, *ante*, page 256.

KANSAS

(L. 1911, c. 218)

The Kansas Act contains no definition.

MASSACHUSETTS

(L. 1911, c. 751)

There is no definition in the Act.

Rhode Island

MICHIGAN

(L. 1912, No. 3)

The Michigan Act contains no definition.

NEVADA

(L. 1911, c. 183)

See § 6, Chapter IX, *ante*, page 263.

NEW HAMPSHIRE

(L. 1911, c. 000)

There is no definition in the New Hampshire Act.

NEW JERSEY

(L. 1911, c. 95)

See Chapters IX (*ante*, page 265) and X (*ante*, page 288).

OHIO

(L. 1911, c. 000)

The Ohio Act contains no definition of temporary total disability.

RHODE ISLAND

(L. 1912, c. 000)

There is no definition of temporary total disability in the Act. For benefits for specific injuries, see Art. II, § 12, in Chapter IX, *ante*, page 266.

Wisconsin

WASHINGTON

(L. 1911, c. 74)

See § 5, in Chapter IX, *ante*, page 269.

WISCONSIN

(L. 1911, c. 50)

There is no definition of temporary total disability in the statute.

CHAPTER XIV

DEFINITION OF PERMANENT PARTIAL DISABILITY

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CALIFORNIA

(L. 1911, c. 399)

There is no definition of permanent partial disability in the California Act.

ILLINOIS

(L. 1911, c. 000)

No definition. See Chapter X, *ante*, page 281.

KANSAS

(L. 1911, c. 218)

The Kansas Act contains no definition.

MASSACHUSETTS

(L. 1911, c. 751)

There is no definition in the Act.

Rhode Island

MICHIGAN

(L. 1912, No. 3)

The Michigan Act contains no definition.

NEVADA

(L. 1911, c. 183)

See § 6, in Chapter IX, *ante*, page 263.

NEW HAMPSHIRE

(L. 1911, c. 000)

There is no definition in the New Hampshire Act.

NEW JERSEY

(L. 1911, c. 95)

See Chapters IX (*ante*, page 265) and X (*ante*, page 288).

OHIO

(L. 1911, c. 000)

The Ohio Act contains no definition of permanent partial disability.

RHODE ISLAND

(L. 1912, c. 000)

For specific benefits for injuries of a permanent nature, even though disability may only be partial, see Art. II, § 12, in Chapter IX, *ante*, page 266.

Wisconsin

WASHINGTON

(L. 1911, c. 74)

See § 5, in Chapter IX, *ante*, page 269.

WISCONSIN

(L. 1911, c. 50)

There is no definition of permanent partial disability in the statute.

CHAPTER XV

DEFINITION OF TEMPORARY PARTIAL DISABILITY

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CALIFORNIA

(L. 1911, c. 399)

There is no definition of temporary partial disability in the California Act.

ILLINOIS

(L. 1911, c. 000)

No definition. See Chapter X, *ante*, page 281.

KANSAS

(L. 1911, c. 218)

The Kansas Act contains no definition.

MASSACHUSETTS

(L. 1911, c. 751)

There is no definition in the Act.

MICHIGAN

(L. 1912, No. 3)

The Michigan Act contains no definition.

Wisconsin

NEVADA

(L. 1911, c. 183)

See § 6, in Chapter IX, *ante*, page 263.

NEW HAMPSHIRE

(L. 1911, c. 000)

There is no definition in the New Hampshire Act.

NEW JERSEY

(L. 1911, c. 95)

See Chapters IX (*ante*, page 265) and X (*ante*, page 288).

OHIO

(L. 1911, c. 000)

The Ohio Act contains no definitions.

RHODE ISLAND

(L. 1911, c. 000)

For benefits for specific injuries, see Art. II, § 12, in Chapter IX, *ante*, page 266. There is no definition of temporary partial disability in the Act.

WASHINGTON

(L. 1911, c. 74)

See § 5, in Chapter IX, *ante*, page 269.

WISCONSIN

(L. 1911, c. 50)

There is no definition of temporary partial disability in the statute.

CHAPTER XVI

WHO ARE DEPENDENTS

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Dependent of more than one workman

1. In general.

The expression "dependent" means dependent for the ordinary necessities of life for a person of that class and position in life, taking into account the financial and social position of the recipient. Whether a person is or is not dependent on a workman's earnings is a question of fact. *Simmons v. White Bros.* (1899), 80 L. T. 344; 1 W. C. C. 89. The test of dependency is not whether the family could support life without the contributions of the deceased, but whether they depended upon them as part of their income or means of living. *Howells v. Vivian and Sons* (1901), 85 L. T. 529; 4 W. C. C. 106. A person may be a dependent of a deceased workman even though such workman has only sent money at irregular intervals and in irregular amounts. *Follis v. Schaaque Machine Works* (1908), 13 B. C. 471; 1 B. W. C. C. 442.

2. Dependent of more than one workman.

One person can be the dependent of more than one workman and in case of death of two or more workmen such dependent can recover more than the maximum amount allowed for the death of one workman. (House of Lords), *Hodgson v. Owners of West Stanley Colliery* (1910), 102 L. T. 194; A. C. (H. L.) 229; 3 B. W. C. C. 260. In the last-mentioned case two sons and their father, out of a family of ten, were killed in a mine disaster. The wages of all three had gone into a common fund to support the family consisting of a mother and six children besides those who were killed. None of the other children were wage earners. It was held that the widow was entitled to a death benefit by way of compensation not only for the death of her

Parents

husband but also for the death of each of the two sons.

3. Partial and total dependents of same workman.

Partial dependents may be entitled to compensation although there are others who were wholly dependent on the deceased workman. *Robinson v. Anon* (1904), 6 W. C. C. 117.

4. Parents.

A workman who was drowned at sea had been accustomed in previous employments to give money regularly to his parents, who, with their family, claimed compensation as dependents of the deceased. The judge found that the family were partly dependent on the workman's earnings, and awarded compensation. On appeal it was held that dependency is a question of fact, and that there was evidence to support the decision. *Turner and Others v. Miller and Richards* (1910), 3 B. W. C. C. 305. A father claimed compensation as a dependent of his son who had paid considerable sums to the family fund, while employed as a fisherman, in the years 1906, 1907 and 1908. The last payment was made early in 1909. In the summer of that year he made two voyages of a month. He did not send any part of his wages for these two voyages, to his father, and on the last of these voyages he was drowned. It was held that there was evidence to justify the County Court judge in finding that the father was a partial dependent. *Robertson v. Hall Brothers Steamship Co.* (1910), 3 B. W. C. C. 368. The deceased was a boy of sixteen earning 8s. a week, which he gave to his parents, they providing him with food, clothes, etc. His father was a collier earning 25s. a

Father dependent of son

week, and there were five other children, two of whom contributed their earnings, the one 12s. and the other 7s. 6d. a week, to swell the common fund. It was held that the parents were dependent upon the earnings of the deceased. *The Main Colliery Co. v. Davies* (1900), 80 L. T. 674; 2 W. C. C. 108.

5. Mother, whose husband is living, as dependent of son.

A boy was killed. His mother was supported by her husband but claimed compensation as a partial dependent because the boy's earnings were paid into the family fund. It was held by the House of Lords that compensation should be awarded. *McLean v. Moss Bay Haematite Iron and Steel Co.* (1910), 3 B. W. C. C. 402; following *Hodgson v. Owners of West Stanley Colliery*, 3 B. W. C. C. 260.

6. Father dependent of son; allowance for son's maintenance.

The applicant was the father of a workman who met with a fatal accident. At the time of his death the workman was aged fourteen years. His wages were 6s. 11d. per week, which were given to his father and helped to maintain the family. The father worked at a colliery, and supplemented his earnings by carrying on the trade of a barber on certain evenings and part of Saturday. The deceased used to assist his father as a barber, and the father estimated his services as worth 6s. per week. The County Court judge held that the father was not a dependent or partial dependant, inasmuch as the 6s. 11d. was not more than sufficient to maintain the deceased. The decision of

Wife separated from husband before his death

the County Court judge was reversed by the Court of Appeal, holding that in case of partial dependency, it was not legitimate to have regard to the amount which the maintenance of the deceased would have cost. *Hall v. Tamworth Colliery Co.* (1910), 4 B. W. C. C. 107. The decision of the Court of Appeal was reversed by the House of Lords, however, where it was held that in determining the question of fact as to the father's dependency on the son, the County Court judge should consider both the cost of the maintenance of the son and the value to the father of the son's services in the barber business. *Tamworth Colliery Co. v. Hall* (1911), 4 B. W. C. C. 313.

7. Widow and children dependents of father when other children contribute to support of family.

The earnings of a father and a portion of the earnings of three of the elder children were used to support the family consisting of those mentioned, a wife, and several younger children, who did not work. Upon the death of the father it was held that the widow and the younger children were wholly dependent upon the father for support, within the meaning of the Compensation Act. *Senior v. Fountains & Burnley* (1907), 23 T. L. R. 634; 9 W. C. C. 116.

8. Wife separated from husband before his death.

Where husband and wife were voluntarily living apart and the wife was earning her own living at the time of his death and did not receive any support from him whatsoever prior to his death, it was held by the House of Lords, reversing the Court of Appeal and County Court that the widow was not entitled to com-

Illegitimate children

pensation. The rule was laid down that the mere fact that a man in ordinary circumstances is liable to support his wife in law, is not of itself sufficient evidence to support a claim for compensation by his widow; that the obligation or liability to support is not the same as actual support. Lord ROBSON declared: "Money coming to a widow under the Act is not a present in consideration of her status; it is a payment by a third person to compensate her, as a dependent, for her actual pecuniary loss by her husband's death and * * * there is no rule of law to prevent the arbitrator from finding that, though married to the deceased, the applicant was not in fact dependent upon him." *New Monckton Collieries v. Keeling* (1911), 4 B. W. C. C. 332, reversing *Keeling v. New Monckton Collieries* (1910), 4 B. W. C. C. 49. Where a woman left her husband because of cruel treatment and had lived apart from him and supported herself and a child for about twelve years prior to the husband's death, it was held that she was not a dependent and was not entitled to compensation upon the death of the husband through accident. *Lindsay v. M'Glashen & Son* (1908), 45 Scotch L. R. 559; 1 B. W. C. C. 85. A wife who had been turned out of her home by her husband and had not been living with or supported by him for eleven years before his death, but who had made endeavors to obtain support, was held to be in part dependent upon her husband's earnings at the time of his death and therefore entitled to compensation. *Medler v. Medler* (1908), 1 B. W. C. C. 332.

9. Illegitimate children.

An illegitimate child who was taken in charge by a

Mother of illegitimate child

friend of the mother, was held not to be a dependent of the mother who was killed by an accident. *Briggs v. Mitchell* (1911), 48 Scotch L. R. 606; 4 B. W. C. C. 400. But see *Schofield v. Orrell Colliery Co.* (1908), 100 L. T. 104; 2 B. W. C. C. 301, cited in paragraph 12, below.

10. Parents of illegitimate children.

Neither the mother nor the putative father of an illegitimate child are entitled to compensation upon the death of the child, especially where the mother is living with and being supported by her husband. *McLean v. Moss Bay Hematite Iron and Steel Co.* (1909), 100 L. T. 871; 2 B. W. C. C. 282.

11. Posthumous child.

A posthumous child may be a dependent of a deceased workman and entitled to compensation. (House of Lords), *Villar v. Gilbey* (1907), A. C. 139; *Williams v. Ocean Coal Co.* (1907), 97 L. T. 150; 9 W. C. C. 44. An unborn child is dependent upon the earnings of the father. *Day v. Markham* (1904), 6 W. C. C. 115.

12. Posthumous illegitimate child.

A posthumous illegitimate child may be a dependent and entitled to compensation for the death of the father of the child. *Schofield v. Orrell Colliery Co.* (1908), 100 L. T. 104; 2 B. W. C. C. 301.

13. Mother of illegitimate child as dependent of father of child.

The mother of an illegitimate child who has obtained an order of filiation against the father of the child is entitled to compensation on behalf of the

Inmate of workhouse

child, upon the death of the father through an accident, even though the father had evaded payment of the amount awarded in the filiation proceeding, by changing his name and concealing his identity. *Bowhill Coal Co. v. Neish and Others* (1908), 46 Scotch L. R. 250; 2 B. W. C. C. 253. Where a man and woman hold themselves out to the world to be married and the man is killed by accident, it seems that the woman and her child may recover compensation upon sufficient evidence being given of a common-law marriage. *Fife Coal Co. v. Wallace* (1909), 46 Scotch L. R. 727; 2 B. W. C. C. 264.

14. Aliens.¹

The benefits of the British Columbia Act do not extend to alien dependents residing abroad, where the workman is killed in British Columbia. *Krzus v. Crow's Nest Pass Coal Co.* (1911), 4 B. W. C. C. 469. Where there is no special provision in the Act relative to the residence of dependents, it is no objection to a claim for compensation by dependents that they are alien residents of a foreign country. *Varesick v. British Columbia Copper Co.* (1906), 12 B. C. 286; 1 B. W. C. C. 446.

15. Inmate of workhouse.

A person in a workhouse is not necessarily dependent on the earnings of another because that other is legally liable to contribute to the cost of his maintenance. *Rees v. Penrikyber Navigation Colliery Co.* (1902), 87 L. T. 661; 5 W. C. C. 117.

¹ The various acts of the States of the Union have special provisions on this subject.

16. Representative of deceased dependent.

Where a dependent dies without having made claim for compensation under the Act, the legal representatives of such dependent may claim compensation as the right to make claim became vested in the dependent at the time of the death of the workman and survived to the legal representatives of the dependent. (House of Lords), *United Collieries v. Hendry* (1909), 101 L. T. 129; A. C. (H. L.) 383; 2 B. W. C. C. 308. Where a widow, of a workman whose death has been caused by accident in his master's service, makes application for compensation and subsequently dies the personal representative of such widow can recover the same compensation that the widow could have recovered even though such representative is not a dependent of the deceased workman. *Darlington v. Roscoe & Sons* (1910), 96 L. T. 179; 9 W. C. C. 1. The court discusses but does not decide the question of whether or not the representative of the widow could have recovered if the widow had not applied for compensation before her death. The court discussed the Irish case of *O'Donovan v. Cameron, Swan & Co.* (1901), 2 Irish R. 633; wherein it was held that the personal representative of a deceased dependent who had not made application for compensation before her death could not recover, and distinguished the two cases on the ground that in one the dependent had made claim for compensation before her death and in the other she had not made such claim.

The right of a mother to claim compensation because of the death of her son, upon whom she was dependent, vests in her at the time of her son's death and the personal representatives of the mother can

When compensation to workman terminated before death

maintain a proceeding for such compensation, even though the mother failed to take proceedings during her lifetime. *Hendry v. United Collieries* (1908), 45 Scotch L. R. 944; 1 B. W. C. C. 289.

17. Right of dependents independent of that of deceased.

A workman was injured by accident. He gave notice of injury, asking his employers to treat it as a notice under the Employers' Liability and Workmen's Compensation Acts. His employers settled with him for a lump sum, obtaining a receipt releasing them from all liability under the Employers' Liability Act and at common law. The workman died and his dependents claimed under the Workmen's Compensation Act, subject to the deduction of the sum paid under the settlement. The County Court judge found as a fact that there was no *bona fide* settlement and made an award in favor of the dependents. It was held that the right of the dependents was independent of, and not derived from, that of the deceased, and that they were therefore entitled to recover. *Howell v. Bradford & Co.* (1911), 104 L. T. 433; 4 B. W. C. C. 203.

18. Claim by dependents when compensation to workman terminated before death.

A workman was injured, and received compensation. A memorandum of agreement to pay him compensation was filed, and on an application to review the payments thereunder were terminated. Subsequently the man died and his dependents applied for compensation. It was held that the award terminating the rights of the workman was not a bar to the claim by the dependents. *Jobson v. W. Cory & Sons* (1911), 4 B. W. C. C. 284.

19. Dependents receiving other income because of death of workman.

Moneys coming to dependents on the death of a workman do not affect the question of whether or not they were dependent upon his earnings at the time of his death. *Pryce v. Penrikyber Navigation Colliery Co.* (1901), 85 L. T. 477; 4 W. C. C. 115.

20. Question of dependency is one of fact.

"The question of dependency is not a question of law at all. It is purely a question of fact." *Main Colliery Co. v. Davies* (1900), A. C. 358; 1 W. C. C. 92; 2 W. C. C. 108; *Hodgson v. Owners of West Stanley Colliery* (1910), A. C. (H. L.) 229; 102 L. T. 194; 3 B. W. C. C. 260. Both of the above cases were decided in the House of Lords.

21. Necessity of administering on estate.

It is not necessary for a dependent to take out letters of administration to the estate of deceased. *Clatworthy v. R. & H. Green* (1902), 86 L. T. 702; 4 W. C. C. 152.

CALIFORNIA

(L. 1911, c. 399)

"§ 9 (3) The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employé:

"(a) A wife upon a husband.

"(b) A husband upon a wife upon whose earnings he is partially or wholly dependent at the time of her death.

"(c) A child or children under the age of eighteen years (or over said age, but physically or mentally

Kansas

incapacitated from earning), upon the parent with whom he or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them. In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the death of the employé, and in such other cases if there is more than one person wholly dependent, the death benefit shall be divided equally among them and persons partially dependent, if any, shall receive no part thereof, and if there is more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

“(4) Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the death of the employé, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions, and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees.”

ILLINOIS

(L. 1911, c. 000)

See §§ 4 *a* and *e*, in Chapter VIII, *ante*, page 214.

KANSAS

(L. 1911, c. 218)

“§ 9 (*j*). ‘Dependents’ means such members of the workman’s family as were wholly or in part dependent

Massachusetts

upon the workman at the time of the accident. And 'members of a family' for the purposes of this act means only widow or husband, as the case may be, and children; or if no widow, husband or children, then parents and grandparents, or if no parents or grandparents, then grandchildren; or if no grandchildren, then brothers and sisters. In the meaning of this section parents include step-parents, children include step-children, and grandchildren include step-grandchildren, and brothers and sisters include step-brothers and step-sisters, and children and parent include that relation by legal adoption."

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employé:

"(a) A wife upon a husband with whom she lives at the time of his death.

"(b) A husband upon a wife with whom he lives at the time of her death.

"(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

"In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall

Michigan

be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency."

MICHIGAN

(L. 1912, No. 3)

"Part II, § 6. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employé:

"(a) A wife upon a husband with whom she lives at the time of his death;

"(b) A husband upon a wife with whom he lives at the time of her death;

"(c) A child or children under the age of sixteen years (or over said age, if physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency. No person shall be considered a dependent, unless a member of the family of the deceased employé,

New Hampshire

or bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister.

"§ 7. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employé, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto, or their legal guardians or trustees. In case of the death of one such dependent his proportion of such compensation shall be payable to the surviving dependents pro rata. Upon the death of all such dependents compensation shall cease. No person shall be excluded as a dependent who is a non-resident alien. No dependent of an injured employé shall be deemed, during the life of such employé, a party in interest to any proceeding by him for the enforcement of collection of any claim for compensation, nor as respects the compromise thereof by such employé."

NEVADA

(L. 1911, c. 183)

"'Dependents' means wife, father, mother, husband, sister, brother, child or grandchild; *provided*, that they were wholly or partly dependent upon the earnings of the workman at the time of his death."

§ 1. See Chapter II, *ante*, page 150.

NEW HAMPSHIRE

(L. 1911, c. 000)

"Widow, children, or parents resident of this State."
See § 6, in Chapter VIII, *ante*, page 221.

Rhode Island

NEW JERSEY

(L. 1911, c. 95)

See Chapter VIII, *ante*, page 222.

OHIO

(L. 1911, c. 000)

“§ 29. *Benefits—to whom paid.* The benefits, in case of death, shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the Board, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. Payment to a dependent subsequent in right may be made, if the Board deem proper, and shall operate to discharge all other claims therefor.

“§ 30. The dependent or person to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the Board.”

RHODE ISLAND

(L. 1912, c. 000)

“Art. II, § 7. *Dependents.* The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employé:—

“(a) A wife upon a husband with whom she lives or upon whom she is dependent at the time of his death.

“(b) A husband upon a wife with whom he lives or upon whom he is dependent at the time of her death.

“(c) A child or children, including adopted and

Washington

stepchildren, under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, upon the parent with whom he is or they are living or upon whom he or they are dependent at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the compensation thereunder shall be divided equally among them.

"In all other cases questions of entire or partial dependency shall be determined in accordance with the fact as the fact may have been at the time of the injury. In such other cases, if there is more than one person wholly dependent, the compensation shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof during the period in which compensation is paid to persons wholly dependent. If there is no one wholly dependent and more than one person partly dependent, the compensation shall be divided among them according to the relative extent of their dependency.

"§ 8. *Dependents—how determined.* No person shall be considered a dependent unless he is a member of the employé's family or next of kin wholly or partly dependent upon the wages, earnings or salary of the employé for support at the time of the injury."

WASHINGTON

(L. 1911, c. 74)

"§ 3. * * * Dependent means any of the following named relatives of a workman whose death results from any injury and who leaves surviving no widow, widower, or child under the age of sixteen years, viz.: invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father,

Wisconsin

mother, grandfather, grandmother, step-father, step-mother, grandson, granddaughter, step-son, step-daughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident, are dependent, in whole or in part, for their support upon the earnings of the workman. Except where otherwise provided by treaty, aliens, other than father or mother, not residing within the United States at the time of the accident, are not included.

“Beneficiary means a husband, wife, child or dependent of a workman, in whom shall vest a right to receive payment under this act.

“Invalid means one who is physically or mentally incapacitated from earning.

“The word ‘child,’ as used in this act, includes a posthumous child, a child legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury.”

“§ 5. (i) A husband or wife of an injured workman, living in a state of abandonment for more than one year at the time of the injury or subsequently, shall not be a beneficiary under this act.”

WISCONSIN

(L. 1911, c. 50)

“§ 2394-10. (3.) The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employé:

“(a) A wife upon a husband with whom she is living at the time of his death.

“(b) A husband upon a wife with whom he is living at the time of her death.

“(c) A child or children under the age of eighteen years (or over said age, but physically or mentally

incapacitated from earning), upon the parent with whom he or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

"In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the death of the employé; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partially dependent, if any, shall receive no part thereof; and if there is more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

"4. No person shall be considered a dependent unless a member of the family of the deceased employé, or bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister.

"5. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employé, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees; provided that in case of the death of a dependent whose right to a death benefit has thus become fixed, so much of the same as is then unpaid shall be recoverable by and payable to his personal representative in gross. No person shall be excluded as a dependent who is a non-resident alien.

Wisconsin

"6. No dependent of an injured employé shall be deemed, during the life of such employé, a party in interest to any proceeding by him for the enforcement or collection of any claim for compensation, nor as respects the compromise thereof by such employé."

CHAPTER XVII

DEFINITIONS NOT OTHERWISE CLASSIFIED

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“It ought to be remembered that the Workmen’s Compensation Acts are expressed not in technical but in popular language, and ought to be construed not in a technical but in a popular sense.” *Smith v. Coles* (1905), 2 K. B. 827; 8 W. C. C. 116; *Rogers v. Cardiff Corporation*, 8 W. C. C. 51. “We have been told by the House of Lords to give the terms used in the Workmen’s Compensation Act, their practical, popular meaning, and not to put a technical construction on them.” *Adams v. Shaddock* (1905), 2 K. B. 859; 8 W. C. C. 58.

CALIFORNIA

(L. 1911, c. 399)

For definitions of employers and employés see Chapter II, *ante*, page 132, and §§ 4 and 7 of the Act in that Chapter.

ILLINOIS

(L. 1911, c. 000)

“§ 21. The term ‘employé’ as used in this Act shall be held to include only such persons as may be exposed

Kansas

to the necessary hazards of carrying on any employment or enterprise referred to in Section 2 of this Act. Persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer's trade or business, are not included in the foregoing definition.

"§ 22. Section 21 shall not be construed to include any employé engaged in any work of an incidental character unconnected with the dangers necessarily involved in carrying on any employment or enterprise referred to in Section 2, or in any work of a clerical or administrative nature which does not expose the employé to the inherent hazards of any such employment or enterprise.

KANSAS

(L. 1911, c. 218)

"§ 9. *Definitions.* In this Act, unless the context otherwise requires.

"(a) 'Railway' includes street railways and interurbans; and 'employment on railways' includes work in depots, power houses, round-houses, machine shops, yards, and upon the right of way, and in the operation of its engines, cars and trains, and to employés of express companies while running on railroad trains.

"(b) 'Factory' means any premises wherein power is used in manufacturing, making, altering, adapting, ornamenting, finishing, repairing or renovating any article or articles for the purpose of trade or gain or of the business carried on therein, including expressly any brick yard, meat-packing house, foundry, smelter, oil refinery, lime burning plant, steam heating plant, electric lighting plant, electric power plant and water power plant, powder plant, blast furnace,

Kansas

paper mill, printing plant, flour mill, glass factory, cement plant, artificial gas plant, machine or repair shop, salt plant, and chemical manufacturing plant.

“(c) ‘Mine’ means any opening in the earth for the purpose of extracting any minerals, and all underground workings, slopes, shafts, galleries and tunnels, and other ways, cuts and openings connected therewith, including those in the course of being opened, sunk or driven; and includes all the appurtenant structures at or about the openings of the mine, and any adjoining adjacent work place where the material from a mine is prepared for use or shipment.

“(d) ‘Quarry’ means any place, not a mine, where stone, slate, clay, sand, gravel or other solid material is dug or otherwise extracted from the earth for the purpose of trade or bargain or of the employer’s trade or business.

“(e) ‘Electrical work’ means any kind of work in or directly connected with the construction, installation, operation, alteration, removal or repair of wires, cables, switchboards or apparatus, used for the transmission of electrical current.

“(f) ‘Building work’ means any work in the erection, construction, extension, decoration, alteration, repair or demolition of any building or structural appurtenance.

“(g) ‘Engineering work’ means any work in the construction, alteration, extension, repair or demolition of a railway (as hereinbefore defined) bridge, jetty, dike, dam, reservoir, underground conduit, sewer, oil or gas well, oil tank, gas tank, water tower, or water works (including standpipes or mains) any caisson work or work in artificially compressed air, any work in dredging, pile driving, moving build- ’

Massachusetts

ings, moving safes, or in laying, repairing or removing, underground pipes and connections, the erection, installing, repairing, or removing of boilers, furnaces, engines and power machinery, (including belting and other connections) and any work in grading or excavating where shoring is necessary or power machinery or blasting powder, dynamite or other high explosives is in use (excluding mining and quarrying).

“(h) ‘Employer’ includes any person or body of persons corporate or unincorporate, and the legal representative of a deceased employer or the receiver or trustee of a person, corporation, association or partnership.

“(i) ‘Workman’ means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, but does not include a person who is employed otherwise than for the purpose of the employer’s trade or business. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependents, as hereinafter defined, or to his legal representative, or where he is a minor or incompetent, to his guardian.”

MASSACHUSETTS

(L. 1911, c. 751)

“Part V, § 2. The following words and phrases, as used in this Act, shall, unless a different meaning is plainly required by the context, have the following meaning:—

“‘Employer’ shall include the legal representative of a deceased employer.

“‘Employé’ shall include every person in the serv-

ice of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer. Any reference to an employé who has been injured shall, when the employé is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.

“‘Dependents’ shall mean members of the employé’s family or next of kin who were wholly or partly dependent upon the earnings of the employé for support at the time of the injury.

“‘Average weekly wages’ shall mean the earnings of the injured employé during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employé lost more than two weeks’ time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employé has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

“‘Association’ shall mean the Massachusetts Employés Insurance Association.

“‘Subscriber’ shall mean an employer who has

New Jersey

become a member of the association by paying a year's premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the insurance commissioner as provided in Part IV, section twelve."

MICHIGAN

(L. 1912, No. 3)

See Chapters II and XVI.

NEVADA

(L. 1911, c. 183)

As to "Employer," "Workmen" and Dependents, see § 2, in Chapter II, *ante*, page 151.

NEW HAMPSHIRE

(L. 1911, c. 000)

"Dependents," "Widow, children and parents resident of this State." See § 6, in Chapter VIII, *ante*, page 221.

There are no other definitions in the New Hampshire Act.

NEW JERSEY

(L. 1911, c. 95)

"SECTION III**"GENERAL PROVISIONS**

"23. *What constitutes willful negligence.* For the purposes of this Act, willful negligence shall consist of (1) deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference

Rhode Island

to safety, or (3) intoxication, operating as the proximate cause of injury.

"Use of certain words. Wherever in this act the singular is used the plural shall be included; where the masculine gender is used, the feminine and neuter shall be included.

"Synonyms. Employer is declared to be synonymous with master and includes natural persons, partnerships and corporations; employé is synonymous with servant and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments.

"As to amputations. Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot."

OHIO

(L. 1911, c. 000)

The Ohio Act contains no definitions.

RHODE ISLAND

(L. 1912, c. 000)

"ARTICLE V

"MISCELLANEOUS PROVISIONS

"§ 1. In this act, unless the context otherwise requires:

"(a) 'Employer' includes any person, co-partnership, corporation or voluntary association, and the legal representative of a deceased employer.

"(b) 'Employé' means any person who has en-

Wisconsin

tered into the employment of, or works under contract of service or apprenticeship with, an employer, and whose remuneration does not exceed eighteen hundred dollars a year. It does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employer's trade or business. Any reference to an employé who has been injured shall, where the employé is dead, include a reference to his dependents as hereinbefore defined, or to his legal representative, or, where he is a minor, or incompetent, to his conservator or guardian."

WASHINGTON

(L. 1911, c. 74)

See §§ 2 and 3, in Chapter II, *ante*, page 164. See § 5 in Chapter IX, *ante*, page 269. See § 5 (*i*) in Chapter XVI, *ante*, page 331.

WISCONSIN

(L. 1911, c. 50)

For definition of "employés" who come within the provisions of the statute see Chapter II, *ante*, page 170.

CHAPTER XVIII

GARNISHMENT OR SEIZURE OF AWARDS FOR DEBT, AND ASSIGNMENT OF AWARDS

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CALIFORNIA

(L. 1911, c. 399)

“§ 22. No claim for compensation under this Act shall be assignable before payment, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, adjudged or paid, be subject to be taken for the debts of the party entitled thereto.”

ILLINOIS

(L. 1911, c. 000)

“§ 11. * * * the payments due under such compensation provisions shall not be subject to attachment, levy, execution, garnishment or satisfaction of debts, except to the same extent and in the same manner as wages or earnings for personal service are now subject to attachment, levy, execution, garnishment or satisfaction of debts under the laws of this State, and shall not be assignable * * *

New Hampshire

KANSAS

(L. 1911, c. 218)

"§ 15. The payments due under this act, as well as any judgment obtained thereunder, shall not be assignable or subject to levy, execution or attachment, except for medicine, medical attention and nursing."

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 21. No payment under this act shall be assignable or subject to attachment, or be liable in any way for any debts."

MICHIGAN

(L. 1912, c. 000)

"Part II, § 21. No payment under this act shall be assignable or subject to attachment or garnishment, or be held liable in any way for any debts."

NEVADA

(L. 1911, c. 183)

There is no provision on this subject in the Nevada Act.

NEW HAMPSHIRE

(L. 1911, c. 000)

"§ 10. * * * Weekly payments due under this act shall not be assignable or subject to levy, execution, attachment or satisfaction of debts. Any right to receive compensation under this act shall be extinguished by the death of the person entitled thereto."

New Jersey

NEW JERSEY

(L. 1911, c. 95)

"§ II, paragraph 22 in Part 22. * * * *Claims not assignable.* Claims or payments due under this act shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment."

OHIO

(L. 1911, c. 000)

"§ 35. *Benefits—creditors.* Benefits before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employés or their dependents."

RHODE ISLAND

(L. 1912, c. 000)

"Art. II, § 23. *Claims not assignable.* No claims for compensation under this act, or under any alternative scheme permitted by Article IV of this act, shall be assignable, or subject to attachment, or liable in any way for any debts."

Article IV provides for an alternative scheme. See Chapter XXVII.

WASHINGTON

(L. 1911, c. 74)

"§ 10. *Exemption of Awards.* No money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor ever be

Wisconsin

taken in execution or attached or garnished, nor shall the same pass to any other person by operation of law. Any such assignment or charge shall be void."

WISCONSIN

(L. 1911, c. 50)

"§ 2394-23. No claim for compensation under this act shall be assignable before payment, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, adjudged, or paid, be subject to be taken for the debts of the party entitled thereto."

CHAPTER XIX

ATTORNEY'S FEES ¹

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CALIFORNIA

(L. 1911, c. 399)

The California Act is silent on the question of attorney's fees.

ILLINOIS

(L. 1911, c. 000)

"§ 11. * * * No claim of any attorney-at-law for services in securing a recovery under this Act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record which approval may be made in term, time or vacation. * * * "

KANSAS

(L. 1911, c. 218)

"§ 15. * * * no claim of any attorney-at-law for services rendered in securing such indemnity or compensation or judgment shall be an enforceable lien thereon, unless the same has been approved in writing

¹ For fees and costs see Chapter XXXI, *post*, page 550.

New Hampshire

by the judge of the court where said case was tried; but if no trial was had then by any judge of the district court of this state to whom such matter has been regularly submitted, on due notice to the party or parties in interest of such submission."

"§ 38. *Attorney's liens.* Contingent fees of attorneys for services and proceedings under this act shall in every case be subject to approval by the court."

MASSACHUSETTS

(L. 1911, c. 751)

"Part III, § 13. Fee of attorneys and physicians for services under this act shall be subject to the approval of the industrial accident board."

MICHIGAN

(L. 1912, No. 3)

"Part III, § 10. * * * The fees and the payment thereof of all attorneys and physicians for services under this act shall be subject to the approval of the Industrial Accident Board."

NEVADA

(L. 1911, c. 183)

"§ 9. * * * The prevailing party in any action, brought under the provisions of this Act, shall be entitled to his costs of suit and reasonable attorney's fees."

NEW HAMPSHIRE

(L. 1911, c. 000)

"§ 11. No claim of any attorney-at-law for any contingent interest in any recovery under this act for services in securing such recovery or for disbursements

Rhode Island

shall be an enforceable lien on such recovery, unless the account of the same be approved in writing by a justice of the Superior Court, or, in case the same be tried in any court, by the justice presiding at such trial."

NEW JERSEY

(L. 1911, c. 95)

"§ I-6. *Claim against compensation. Proviso.* No claim for legal services or disbursements pertaining to any demand made or suit brought under the provisions of this act shall be an enforceable lien against the amount paid as compensation, unless the same be approved in writing by the judge or justice presiding at the trial, or in case of settlement without trial, by the judge of the circuit court of the district in which such issue arose; *provided*, that if notice in writing be given the defendant of such claim for legal services or disbursements, the same shall be a lien against the amount paid as compensation, subject to determination of the amount and approval hereinbefore provided."

OHIO

(L. 1911, c. 000)

On appeals to the court from awards by the board "the costs of such proceeding, including a reasonable attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party." § 36.

RHODE ISLAND

(L. 1911, c. 000)

"Art. II, § 3. *Contingent fees.* Contingent fees of attorneys for services under this act shall be subject to the approval of the superior court."

Wisconsin

WASHINGTON

(L. 1911, c. 74)

In cases of appeal for a court review of an award, "It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case."

§ 20. See Chapter XXV, *post*, page 464.

WISCONSIN

(L. 1911, c. 50)

"§ 2394-22. * * * unless previously authorized by the board, no lien shall be allowed, nor any contract be enforceable, for any contingent attorney's fee for the enforcement or collection of any claim for compensation where such contingent fee, inclusive of all taxable attorney's fees paid or agreed to be paid for the enforcement or collection of such claim, exceeds ten per cent of the amount at which such claim shall be compromised, or of the amount awarded, adjudged, or collected."

CHAPTER XX

SUBROGATION BY AND AGAINST EMPLOYERS, INSURANCE COMPANIES AND OTHERS

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There is such an entire lack of harmony in the various acts on the subject of this chapter that no general rules can be laid down. A tendency is shown, however, to give to the employer the right of subrogation against a third person actually causing the injury to the employer's workman for which injury the employer has been called upon to pay compensation. A few of the British cases found to be applicable have been appended below.

Where a workman employed by a subcontractor claims and secures compensation from the principal contractor such principal contractor can recover indemnity from the subcontractor, and in such an action an insurance company which has insured the subcontractor can be brought in as a party defendant. *Evans v. Cook, Lancashire & Yorkshire Accident Ins. Co., Third Parties* (1904), 7 W. C. C. 41.

Where a workman is injured by reason of a breach by two fellow workmen of certain regulations made by

Subrogation

the Secretary of State, under the Factory and Workshop Act, such fellow workmen are liable to indemnify the employers under the Workmen's Compensation Act for the amount which the employers are compelled to pay to the injured workman, as such fellow workmen are persons other than the employer within the meaning of the Compensation Act. *Lees and Sykes v. Dunkerley Brothers* (1910), 103 L. T. 467; 4 B. W. C. C. 115.

The owners of ships employed the defendants to draw coal from nearby railway tracks to a tip on a dock and load it on to the ships. One of the drivers employed by the defendants tripped on the track and was injured by the car his team was hauling. He claimed and secured an award of compensation against the plaintiff, the shipowner. The latter sued the defendant, the employer of the workman, for indemnity, and judgment was awarded in favor of the shipowners. *Pacific Navigation Co. v. Pugh & Son* (1907), 23 T. L. R. 622; 9 W. C. C. 39.

The driver of a motor car, when nearing a cart and horse, knowing that his hooter was out of order, slowed down to six miles an hour. When abreast of the cart the horse became frightened and bolted. The driver was thrown and fatally injured. The dependent claimed compensation from the master, who brought in the driver of the motor car as a third party. The County Court judge held that the damage to the hooter was not the cause of the accident, and that it was not negligence on the part of the driver of the car to continue running on the road with the hooter silent. The widow of the deceased could not therefore have maintained an action against the owners of the motor car for the loss of her husband, and he accordingly

Illinois

dismissed the master's claim for indemnity. On appeal it was held that there was evidence to support the County Court judge's findings of fact and that the mere breach of regulations made under the Motor Act was not necessarily evidence of negligence. *Lankester v. Miller-Hetherington* (1910), 4 B. W. C. C. 80.

CALIFORNIA

(L. 1911, c. 399)

"§ 26. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment of any assignable cause of action in tort which the employé or his personal representative may have against any other party for such injury or death, and such employer may enforce in his own name the liability of such other party."

ILLINOIS

(L. 1911, c. 000)

"§ 16. Any person who shall become entitled to compensation under the provisions of this Act, shall, in the event of his inability to recover such compensation from the employer on account of his insolvency, be subrogated to all the rights of such employer against any insurance company or association which may have insured such employer, against loss growing out of the compensation required by the provisions of this Act to be paid by such employer, and in such case only, a payment of the compensation that has accrued to the person entitled thereto in accordance with the provisions of this Act, shall relieve such insurance company from such liability."

Kansas

“§ 17. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person, other than the employer, to pay damages in respect thereof:

“(a) The employé or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation which he is entitled to under this Act shall be reduced by the amount of damages recovered.

“(b) If the employé or beneficiary has recovered compensation under this Act, the employer by whom the compensation was paid or the person who has been called upon to pay the indemnity under Sections 4 and 5 of this Act, may be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employé to recover damages therefor.”

KANSAS

(L. 1911, c. 218)

“The principal contractor who pays compensation voluntarily to a workman of a subcontractor shall have the right to recover over against the subcontractor.” § 4, (f). See remainder of this section in Chapter III, *ante*, page 183.

See also § 34 as to employés' right to subrogation against an insurance company, in Chapter XXXIII, *post*, page 562.

“§ 5. *Remedies both against employer and stranger.* Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability against some person other than the employer to pay damages in respect thereof. (a) The

Michigan

workman may take proceedings against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to recover both damages and compensation; and (b) If the workman has recovered compensation under this act, the person by whom the compensation was paid, or any person who has been called on to indemnify him under the section of this act relating to subcontracting, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the workman to recover damages therefor."

MASSACHUSETTS

(L. 1911, c. 751)

"Part III, § 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both; and if compensation be paid under this act, the association may enforce in the name of the employé, or in its own name and for its own benefit, the liability of such other person."

For rights and liabilities of principal and subcontractors see Part III, § 17, reprinted in Chapter III, *ante*, page 183.

MICHIGAN

(L. 1911, c. 000)

"Part III, § 15. Where the injury for which compensation is payable under this act was caused under

New Hampshire

circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

NEVADA

(L. 1911, c. 183)

"§ 13. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment of any assignable cause of action in tort which the employé or his personal representative may have against any other party for such injury or death, and such employer may enforce in his own name the liability of such other party."

See also § 10, in Chapter III, *ante*, page 184.

NEW HAMPSHIRE

(L. 1911, c. 000)

Any employer to take advantage of the provisions of the Act must either satisfy the Commissioner of Labor that he is of sufficient financial ability to comply with the Act, or must file a bond "in such form and amount as the Commissioner may prescribe." This bond may be enforced by the Commissioner of Labor "for the benefit of all persons to whom such employer may become liable under this Act in the same manner

Rhode Island

as probate bonds are enforced." § 3. See Chapter II, *ante*, page 155.

NEW JERSEY

(L. 1911, c. 95)

There is no subrogation provision in the New Jersey Act.

OHIO

(L. 1911, c. 000)

The Ohio Act contains no provision on the subject of this chapter.

RHODE ISLAND

(L. 1911, c. 000)

"Art. III, § 21. *Liability of other than employer.* Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employé may take proceedings both against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to receive both damages and compensation; and if the employé has been paid compensation under this act, the person by whom the compensation was paid shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and, to the extent of such indemnity, shall be subrogated to the rights of the employé to recover damages therefor."

Wisconsin

WASHINGTON

(L. 1911, c. 74)

The Washington Act contains no provision on this subject.

WISCONSIN

(L. 1911, c. 50)

“§ 2394–25. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment of any cause of action in tort which the employé or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party.”

CHAPTER XXI

NOTICE OF CLAIM UNDER ACT; WHEN REQUIRED; HOW SERVED; FORM OF NOTICE

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1. Introduction.

All the state laws contain provisions requiring notice to be given by the employé, or his dependents, of an accident and a claim for compensation. Speaking generally these provisions are very liberal in excusing technical defects in such notices. Nevertheless there must be a substantial compliance with the provisions of the statutes or the right to compensation may be forever lost.

Sufficiency of claim for compensation

2. Notice by one dependent does not enure to benefit of another.

The father of a workman killed by accident commenced an action for damages against his son's employer, and on the failure of this action asked for compensation to be assessed in accordance with the Act. The mother and sisters thereupon also claimed compensation in the proceedings by the father, as dependents. They had made no claim previously and much more than six months had passed since the death. It was held that the right given under § 1 (4) of the Act was a personal privilege to the one who brought the action, and that the six months for claim having expired, the mother and sisters were not entitled to compensation. *Kyle v. M'Gintys* (1911), 48 Scotch L. R. 474; 4 B. W. C. C. 389.

3. Sufficiency of claim for compensation.

The wife of an injured workman received from the employer her husband's full wages for several weeks after the accident. The employer then refused to pay the wages any longer and the wife asked him if, as he refused to compensate her husband, whether he would compensate her and her children. It was held that there was no evidence upon which the County Court judge could find that a claim for compensation had been made as required by § 2 (1) of the Act. *Johnson v. Wootton* (1911), 4 B. W. C. C. 258. A workman was injured on July 12th. He saw his employer the same evening but did not mention the accident. He alleged that on the following day he sent notice by messenger. On July 23d he again saw his employer, but said nothing about compensation. He alleged that on

Failure of notice

August 6th he again sent notice by registered post. On August 12th a solicitor sent formal notice on his behalf. The employer denied having received any but the last notice. The County Court judge found that the notice of the accident had not been given as soon as practicable after the happening thereof, and that it had not been established that the employer had not been prejudiced by the delay. It was held on appeal that there was evidence to support the finding. *Leach v. Hickson* (1911), 4 B. W. C. C. 153. An injured workman was waited upon by an agent of an insurance company, with whom his employers were insured, who endeavored to get him to accept compensation, and by a tout to a lawyer, who advised him not to accept compensation, but to claim damages. The workman eventually decided not to accept compensation, and put the matter into the lawyer's hands, who, however, carried nothing to a conclusion, with the result that the six months allowed by the Act for making a claim expired. In an arbitration at the instance of the workman the arbitrator found that the workman was barred from prosecuting the claim, and dismissed the application. It was held by the Court of Sessions of Scotland that as no claim had been made within the six months, the application had been rightly dismissed. *Devons v. Alexander Anderson and Sons* (1910), 48 Scotch L. R. 187; 4 B. W. C. C. 354. A mere notice of injury is not a claim for compensation or a proceeding to recover compensation. *Perry v. Clements* (1901), 3 W. C. C. 56.

4. Failure to give notice; lack of prejudice; burden of proof.

Where no notice has been given the onus lies on the

Failure of notice

applicant for compensation to show lack of prejudice. *Hughes v. Coed Talon Colliery Co.*, 100 L. T. 555; 2 B. W. C. C. 159; *Tibbs v. Watts, Blake, Bearne & Co.*, 2 B. W. C. C. 164. The burden is on the workman of proving that the employers were not prejudiced in their defense where notice of an injury has not been given pursuant to the provisions of the Act. *Hancock v. British Westinghouse Electric Co.* (1910), 3 B. W. C. C. 210. A professional football player was injured while playing, and claimed compensation under the Act. The employers contended that no claim for compensation had been made within six months from the date of the injury. The County Court judge made no finding on that point. It was held on appeal that the onus was upon the applicant to prove that a claim was made within six months, or if no claim was made, to show that he claims within the proviso of § 2 (1) (b) of the Act, excusing the workman where the failure to make a claim has been occasioned by mistake, absence from the United Kingdom or other reasonable cause. *Roberts v. Crystal Palace Football Club* (1909), 3 B. W. C. C. 51. A workman claimed compensation for an alleged injury to his ankle. He had said nothing at the time of the alleged injury and had walked home. He swore that he had sent the notice the next day to the foreman carpenter under whom he worked. This the foreman denied. The job was finished on the day of the alleged accident and all the men were paid off. Formal notice was given two months later. The County Court judge held that although the notice had not been given as soon as practicable, the workman had discharged the onus of showing that the employers were not prejudiced by the delay. It was held on

Ignorance of law not a "mistake" excusing giving of notice

appeal that there was no evidence to support this finding. *Burrell v. Holloway Brothers* (1911), 4 B. W. C. C. 239.

5. Prejudice by failure of notice; omission of notice to insurance company by employer.

An employer is not prejudiced by a failure to receive notice of an accident or claim for compensation by reason of the fact that not receiving such notice he does not give notice to the liability insurance company and is thereby precluded from recovery from the insurance company of the amount which he is compelled to pay the workman. *Butt v. Gellyceidrim Colliery Co.* (1909), 3 B. W. C. C. 44. An employer who has, through delay in giving notice of an accident, lost his right to indemnity against an insurance company is thereby prejudiced in his defense. *Barker v. Holmes* (1904), 6 W. C. C. 52.

6. Sufficient excuse for failure to give notice.

Failure to make a claim within the prescribed period is excused when the applicant was absent abroad at the time of the deceased workman's death, and returned as soon as possible, and after returning has been wrongly advised as to his legal rights. *Smith v. Pearson and Shipley* (1909), 2 B. W. C. C. 468. The foregoing decision was of course made under the particular wording of the British Act.

7. Ignorance of law not a "mistake" excusing giving of notice.

A claim for compensation was not made within six months, as provided for in § 2 (1) of the Act, owing to the workman being ignorant of the existence of the Act,

California

and it was held that this was not a mistake or other reasonable cause within the meaning of the Act, so as to excuse the workman from making a claim. *Roles v. Pascall & Sons* (1911), 104 L. T. 298; 4 B. W. C. C. 148. Where a workman who was injured failed to give notice on the ground that he was in ignorance of the law requiring notice and asked to be excused from such default on the ground of "mistake," it was held that ignorance of the law is no mistake within the meaning of the Compensation Act, and as there was ample evidence upon which the judge could find that the employer was prejudiced by the failure to receive notice the workman was not entitled to compensation. *Bramley v. Evans & Sons* (1909), 3 B. W. C. C. 34.

8. Disability not caused until some time after accident.

The fact that an injury does not cause disability until some time after the accident is a reasonable cause for failure to give notice thereof as the foundation of a claim for compensation. *Tibbs v. Watts, Blake, Bearne & Co.*, 2 B. W. C. C. 164.

9. Waiver of notice by paying compensation.

Written notice of an accident is waived where after notice by parol the employer pays compensation for a time. *Davies v. Point of Ayr Collieries* (1909), 2 B. W. C. C. 157.

CALIFORNIA

(L. 1911, c. 399)

"§ 10. No claim to recover compensation under this act shall be maintained unless within thirty days after

Illinois

the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and the address of the person injured, the time and the place where the accident occurred, and the nature of the injury, and signed by the person injured or some one in his behalf, or in case of his death, by a dependent or some one in his behalf shall be served upon the employer by delivering to and leaving with him a copy of such notice or by mailing to him by registered mail a copy thereof in a sealed and posted envelope addressed to him at his last known place of business or residence. Such mailing shall constitute complete service. Provided, however, that any payment of compensation under this act, in whole or in part, made by the employer before the expiration of said thirty days shall be equivalent to the notice herein required, and provided further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for collections of the claim that there was no intention to mislead the employer, and that he was not in fact misled thereby, and provided further that if no such notice is given and no payment of compensation made, within one year from the date of the accident, the right to compensation therefor shall be wholly barred."

ILLINOIS

(L. 1911, c. 000)

"§ 14. No proceedings for compensation under the Act shall be maintained unless notice of the accident has been given to the employer as soon as practicable after the happening thereof, and during such disability, and unless claim for compensation has been made within six months after the injury, 'except that in

Kansas

case of an accident resulting in temporary disability, notice of such accident must be given to the employer within thirty days after said accident," or in case of the death of the employé or in the event of his incapacity, within six months after such death or incapacity, or in the event that payments have been made under the provisions of this Act, within six months after such payments have ceased. No want or defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings by arbitration or otherwise by the employé, unless the employer proves that he is unduly prejudiced in such proceedings by such want, defect or inaccuracy. Notice of the accident shall, in substance, apprise the employer of the claim of compensation made and shall state the name and address of the employé injured, the approximate date and place of the accident, if known, and in simple language the cause thereof; which notice may be served personally or by registered mail, addressed to the employer at his last known residence or place of business: Provided, that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer or his agent supervising work in which such employé was engaged at the time of the injury.

KANSAS

(L. 1911, c. 218)

"§ 22. *Notice and claim.* Proceedings for the recovery of compensation under this act shall not be maintainable unless written notice of the accident, stating the time, place, and particulars thereof, and the name and address of the person injured, has been given

Massachusetts

within ten days after the accident, and unless a claim for compensation has been made within six months after the accident, or in case of death, within six months from the date thereof. Such notice shall be delivered by registered mail, or by delivery to the employer. The want of, or any defect in such notice, or in its service, shall not be a bar unless the employer proves that he has, in fact, been thereby prejudiced, or if such want or defect was occasioned by mistake, physical or mental incapacity or other reasonable cause, and the failure to make a claim within the period above specified shall not be a bar, if such failure was occasioned by a mistake, physical or mental incapacity or other reasonable cause."

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 15. No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the association or subscriber as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employé, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

"§ 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his legal representative or by a person in his behalf, or by a person to whom payments may be due under this act or by a person in his behalf.

Massachusetts

Any form of written communication signed by any person who may give the notice as above provided, which contains the information that the person has been so injured, giving the time, place and cause of the injury, shall be considered a sufficient notice." (As amended by L. 1912, c. 571.)

"§ 17. The notice shall be served upon the association, or an officer or agent thereof, or upon the subscriber, or upon one subscriber, if there are more subscribers than one, or upon any officer or agent of a corporation if the subscriber is a corporation, by delivering the same to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

"§ 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead and the association was in fact misled thereby. Want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury."

* * * * *

"§ 23. The claim for compensation shall be in writing and shall state the time, place, cause and nature of the injury: it shall be signed by the person injured or by a person in his behalf, or, in the event of his death, by his legal representative or by a person in his behalf, or by a person to whom payments may be due under this act or by a person in his behalf, and shall be filed with the industrial accident board. The failure to make a claim within the period

Michigan

prescribed by section fifteen shall not be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause." (Added by L. 1912, c. 751.)

MICHIGAN

(L. 1912, No. 3)

"Part II, § 15. No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employé, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

"§ 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his dependents or by a person in their behalf.

"§ 17. The notice shall be served upon the employer or an agent thereof. Such service may be made by delivering said notice to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

"§ 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the inten-

Nevada

tion to mislead, and the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, was in fact misled thereby. Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury."

NEVADA

(L. 1911, c. 183)

"§ 4. Notice of accidents must be given partnership or corporation carrying on any to the employer as soon as practicable after the happening thereof, and the claim for compensation with respect to such accident within six months from the occurrence of such accident causing the injury, or in case of death, within six months from the time of death; *provided always*, that the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defense by the want, defect or inaccuracy, and that such want, defect or inaccuracy was occasioned by mistake or other reasonable cause. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury, if known, the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. The notice may be served by delivering the same to or at the residence or place of business of the person upon whom it is to be served, or the notice may also be served by post, by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of

New Hampshire

business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered. Where the employer is a body of persons, natural or artificial, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at the office, or, if there be more than one office, any one of the offices of such body."

NEW HAMPSHIRE

(L. 1911, c. 000)

"§ 5. No proceedings for compensation under this act shall be maintained unless notice of the accident as hereinafter provided has been given to the employer as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured and during such disability, and unless claim for compensation has been made within six months from the occurrence of the accident, or in case of the death of the workman, or in the event of his physical or mental incapacity, within six months after such death or the removal of such physical or mental incapacity, or in the event that weekly payments have been made under this article, within six months after such payments have ceased, but no want or defect or inaccuracy of a notice shall be a bar to the maintenance of proceedings unless the employer proves that he is prejudiced by such want, defect or inaccuracy. Notice of the accident shall appraise the employer of the claim for compensation under this article, and shall state the name and address of the workman injured, and the date and place

New Jersey

of the accident. The notice may be served personally or by sending it by mail in a registered letter addressed to the employer at his last known residence or place of business."

NEW JERSEY

(L. 1911, c. 95)

"§ II, 15. *As to notification of employer.* Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employé, or some one on his behalf, or some of the dependents, or some one on their behalf, shall give notice thereof to the employer within fourteen days of the occurrence of the injury, then no compensation shall be due until such notice is given or knowledge obtained. If the notice is given, or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. If the notice is given, or the knowledge obtained within ninety days, and if the employé, or other beneficiary, shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another person, or to any other reasonable cause or excuse, then compensation may be allowed, unless, and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Unless knowledge be obtained, or notice given, within ninety days after the occurrence of the injury, no compensation shall be allowed."

"§ II, 16. *Service of notice.* The notice referred to may be served personally upon the employer, or upon

Rhode Island

any agent of the employer upon whom a summons may be served in a civil action, or by sending it through the mail to the employer at the last known residence or business place thereof within the State, and shall be substantially in the following form:

"Form of notice. Sufficiency of notice.

"To (name of employer):

You are hereby notified that a personal injury was received by (name of employé injured), who was in your employ at (place) while engaged as (nature of employment), on or about the () day of (), nineteen hundred and (), and that compensation will be claimed therefor.

Signed,

().

but no variation from this form shall be material if the notice is sufficient to advise the employer that a certain employé, by name, received an injury in the course of his employment on or about a specified time, at or near a certain place. Notice served at the office of, or on the person who was the employer's immediate superior, shall be a compliance with this act."

OHIO

(L. 1911, c. 000)

Governed by rules of the State Liability Board of Awards. §§ 8 and 16. See Chapter XXIV, *post*.

RHODE ISLAND

(L. 1912, c. 000)

"Art. II, § 17. *Notice of injury*. No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have

Rhode Island

been given to the employer within thirty days after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within one year after the occurrence of the same, or, in case of the death of the employé, or in the event of his physical or mental incapacity, within one year after death or the removal of such physical or mental incapacity.

“§ 18. Such notice shall be in writing and shall state in ordinary language the nature, time, place, and cause of the injury, and the name and address of the person injured and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his legal representative, or by a dependent, or by a person in behalf of either.

“§ 19. Such notice shall be served upon the employer, or upon one employer, if there are more employers than one, or, if the employer is a corporation, upon any officer or agent upon whom process may be served, by delivering the same to the person on whom it is to be served, or by leaving it at his last known residence or place of business, or by sending it by registered mail addressed to the person to be served, or, in the case of a corporation, to the corporation itself, at his or its last known residence or place of business; and such mailing of the notice shall constitute completed service.

“§ 20. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the nature, time, place or cause of the injury, or the name and address of the person injured, unless it is shown that it was the intention to mislead and the employer was in fact misled thereby. Want of notice shall not be a bar to proceedings under this act, if it be shown that the

Washington

employer or his agent had knowledge of the injury, or that failure to give such notice was due to accident, mistake, or unforeseen cause."

WASHINGTON

(L. 1911, c. 74)

"§ 12. Filing Claim for Compensation.

"(a) Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him, and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.

"(b) Where death results from injury the parties entitled to compensation under this act, or some one in their behalf, shall make application for the same to the department, which application must be accompanied with proof of death and proof of relationship showing the parties to be entitled to compensation under this act, certificates of attending physician, if any, and such other proof as required by the rules of the department.

"(c) If change of circumstance warrant an increase or rearrangement of compensation, like application shall be made therefor. No increase or rearrangement shall be operative for any period prior to application therefor.

"(d) No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued."

Wisconsin

WISCONSIN

(L. 1911, c. 50)

“§ 2394-11. No claim to recover compensation under this act shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and address of the person injured, the time and place where the accident occurred, and the nature of the injury, and signed by the person injured or by some one on his behalf, or in case of his death, by a dependent or some one on his behalf, shall be served upon the employer, either by delivering to and leaving with him a copy of such notice, or by mailing to him by registered mail a copy thereof in a sealed and postpaid envelope addressed to him at his last known place of business or residence. Such mailing shall constitute completed service. Provided, however, that any payment of compensation under this act, in whole or in part, made by the employer before the expiration of said thirty days, shall be equivalent to the notice herein required; and provided further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for collection of the claim that there was no intention to mislead the employer, and that he was not in fact misled thereby; and provided further, that if no such notice is given and no payment of compensation made, within two years from the date of the accident, the right to compensation therefor shall be wholly barred.”

The statute does not specify the form of the notice. For form under New Jersey Act see *ante*, page 372.

CHAPTER XXII

LIMITATIONS ON ACTIONS AND PROCEEDINGS UNDER ACT

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Where compensation has been paid some time, and upon a reference to a medical referee it is found that incapacity has ceased and compensation is stopped the certificate is not a bar to the application of the workman for further compensation when the incapacity has recurred, where there is a mere acquiescence by the workman as to the nonpayment and no proceedings are taken on the report of the referee. It is held that in such a case the matter is merely allowed to go to sleep and that the compensation is not terminated in a manner which is binding on either party. *United Collieries v. King* (1909), 47 Scotch L. R. 41; 3 B. W. C. C. 546.

CALIFORNIA

(L. 1911, c. 399)

Notice of accident must be given within thirty days. § 10. See Chapter XXI, *ante*, page 363. But may be implied. *Id.* If not given at all within one year the right to compensation is wholly lost. *Id.*

Kansas

Notice of hearing on application to the Board must be for a time not more than forty days after filing the application. § 15. See Chapter XXIV, *post*, page 409.

Appeal may be taken within thirty days after judgment rendered on an award. § 18. See Chapter XXV, *post*, page 454.

Notice of hearing before the Board, ten days. § 15. See Chapter XXIV, *post*, page 409.

ILLINOIS

(L. 1911, c. 000)

Notice must be given "as soon as practicable" after the accident; and proceedings on a claim for compensation must be taken within six months after the injury, except in cases of temporary injury. See § 14, Chapter XXI, *ante*, page 364.

Parties must appear before arbitrators within ten days after appointment. § 10. See Chapter XXIV, *post*, page 411.

Appeals to the Circuit Court from the decisions of arbitrators must be taken within twenty days after the filing of the report of the arbitrators. § 10. See Chapter XXIV, *post*, page 411.

KANSAS

(L. 1911, c. 218)

"§ 10. *Incompetency of workman.* In case an injured workman is mentally incompetent or a minor, or where death results from the injury, in case any of his dependents as herein defined is mentally incompetent or a minor, at the time when any right, privilege or election accrues to him under this act, his guardian may, in his behalf, claim and exercise such right, privi-

Massachusetts

lege, or election, and no limitation of time, in this act provided for, shall run, so long as such incompetent or minor has no guardian."

"§ 22. *Notice and claim.* Proceedings for the recovery of compensation under this act shall not be maintainable unless written notice of the accident, stating the time, place, and particulars thereof, and the name and address of the person injured, has been given within ten days after the accident, and unless a claim for compensation has been made within six months after the accident, or in case of death, within six months from the date thereof. Such notice shall be delivered by registered mail, or by delivery to the employer. The want of, or any defect in such notice, or in its service, shall not be a bar unless the employer proves that he has, in fact, been thereby prejudiced, or if such want or defect was occasioned by mistake, physical or mental incapacity or other reasonable cause, and the failure to make a claim within the period above specified shall not be a bar, if such failure was occasioned by a mistake, physical or mental incapacity or other reasonable cause."

"§ 37. *When the cause of action accrues.* The cause of action shall be deemed in every case, including a case where death results from the injury to have accrued to the injured workman at the time of the accident; and the time limited in which to commence an action for compensation therefor shall run as against him, his legal representatives and dependents from that date."

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 14. If an injured employé is mentally incompetent or is a minor at the time when any right

Nevada

or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege."

Notice of the injury must be given within six months after it occurs. Part II, § 15. See Chapter XXI, *ante*, page 366.

A petition to review a finding of a committee of arbitration must be filed within seven days after the finding is filed with the Industrial Accident Board. Part III, § 7. See Chapter XXIV, *post*, page 420.

MICHIGAN

(L. 1912, No. 3)

"Part VI, § 2. If the provisions of this act relating to compensation for injuries to or death of workmen shall be repealed or adjudged invalid or unconstitutional, the period intervening between the occurrence of an injury or death and such repeal, or the final adjudication of invalidity, shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death, but the amount of any compensation which may have been paid for any such injury shall be deducted from any judgment for damages recovered on account of such injury."

NEVADA

(L. 1911, c. 183)

Notice of claim within six months after accident. See § 4, in Chapter XXI, *ante*, page 369.

Time within which arbitration proceedings must be heard. See § 8, in Chapter XXIV, *post*, page 426.

Ohio

NEW HAMPSHIRE

(L. 1911, c. 000)

See § 5, reprinted in Chapter XXI, *ante*, page 370, for time in which notice must be given and other proceedings taken under Act.

“§ 8. In case an injured workman shall be mentally incompetent at the time when any right or privilege accrues to him under this act, the guardian of the incompetent appointed pursuant to law may, on behalf of such incompetent claim and exercise any such right or privilege with the same force and effect as if the workman himself had been competent and had claimed or exercised any such right or privilege, and no limitation of time in this act provided for shall run so long as said incompetent workman has no guardian.”

For time within which to serve notice of injury see § 5, in Chapter XXI, *ante*, page 370.

Notice of proceedings in court; see § 9, in Chapter XXIV, *post*, page 427.

NEW JERSEY

(L. 1911, c. 95)

Notice of the injury must be given by the employé to the employer within ninety days after the accident unless the employer has actual knowledge thereof. See § 2, paragraph 15, Chapter XXI, *ante*, page 371.

OHIO

(L. 1911, c. 000)

Governed by rules of the State Liability Board of awards. §§ 8 and 16. See Chapter XXIV, *post*, pages 434-436.

Washington

As to appeals see § 36, in Chapter XXIV, *post*, page 436.

RHODE ISLAND

(L. 1912, c. 000)

"Art. III, § 18. *Claim when barred.* An employé's claim for compensation under this act shall be barred unless an agreement or a petition, as provided in this Article, shall be filed within two years after the occurrence of the injury, or, in case of the death of the employé, or, in the event of his physical or mental incapacity, within two years after the death of the employé or the removal of such physical or mental incapacity."

WASHINGTON

(L. 1911, c. 74)

"No application for (compensation under the Act) shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued." § 12, (d). See Chapter XXI, *ante*, page 374.

"§ 28. *Statute of Limitations Saved.* If the provisions of this act relative to compensation for injuries to or death of workmen become invalid because of any adjudication, or be repealed, the period intervening between the occurrence of an injury or death, not previously compensated for under this act by lump payment or completed monthly payments, and such repeal or the rendition of the final adjudication of the invalidity shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death: *Provided*, That such action be commenced within one year after such repeal or adjudication; but in any such action any

Wisconsin

sum paid out of the accident fund to the workman on account of injury, to whom the action is prosecuted, shall be taken into account or disposed of as follows: If the defendant employer shall have paid without delinquency into the accident fund the payment provided by section 4, such sums shall be credited upon the recovery as payment thereon, otherwise the sum shall not be so credited but shall be deducted from the sum collected and be paid into the said fund from which they had been previously disbursed."

WISCONSIN

Notice must be given within thirty days. See § 2394-11, Chapter XXI, *ante*, page 375.

Compromises may be modified within one year after they are made. § 2394-15, Chapter XXIV, *post*, page 448.

A notice of hearing on any application made to the Industrial Accident Board shall be made for a time not more than forty days after the filing of the application. See § 2394-16, Chapter XXIV, *post*, page 448.

Within twenty days from the date of an award a party can begin an action for a review thereof. § 2394-19. Chapter XXV, *post*, page 466. The Board must serve its answer within the same length of time. *Id.*

CHAPTER XXIII

EXAMINATIONS BY PHYSICIANS

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1. Demand that workman's attorney be present at medical examination.

A workman in receipt of compensation under the Act was required by his employers to submit himself for examination by a certain duly qualified medical practitioner. The workman refused to do so unless the examination was at his solicitors' office or in his solicitors' presence. The employers repeated their request, but stated that the workman's medical adviser might attend at the examination. The workman again refused unless his conditions were complied with. It was held on these facts that there was a refusal to submit to a medical examination. The court said: "It cannot be too well known that a solicitor's office is

not, in ordinary circumstances, a proper place at which to hold a medical examination of a workman." *Warby v. Plaistowe & Co.* (1910), 4 B. W. C. C. 67.

2. Unreasonable demand that workman's medical attendant be present at examination.

A workman having claimed compensation under the Act of 1906, his employers required him to submit himself for medical examination. The workman refused except on condition that his own medical attendant should be present throughout the examination. He conceded that there were no special circumstances in his case which called for the presence of his medical attendant. It was held that the workman's refusal to submit to examination unless his own medical attendant was present was a "refusal within the Act." *Morgan v. William Dixon* (1910), 48 Scotch L. R. 296; 4 B. W. C. C. 363. A workman who refuses to be examined by the employer's physician unless the workman's own medical adviser is present, does not refuse to submit himself to such examination or obstruct the same, within the meaning of the Act. *Devitt and Crosby Magee v. The Owners of the S. S. "Bainbridge"* (1909), 2 K. B. 802; 2 B. W. C. C. 383.

3. Cause of death submitted to medical referee.

A workman was injured and afterward died in the hospital. His dependent claimed compensation, and on the hearing conflicting medical evidence was given as to the cause of death. The County Court judge thereupon submitted the matter to a medical referee, in accordance with Schedule II (15) of the Act, which provides that the judge may submit to a referee any

Refusal of workman to undergo surgical operation

matter which seems material, "subject to regulations made by the Secretary of State and the Treasury." These regulations (dated June 24, 1907), in fact, deal only with the case of a living workman. It was held that the judge had, nevertheless, jurisdiction to submit for report the question of the cause of death." *Carolan v. Harrington & Sons* (1911), 2 K. B. 733; 4 B. W. C. C. 253.

4. Refusal of workman to undergo surgical operation.

An employer is not entitled to have compensation terminated because of the refusal of the workman to undergo an operation unless he can show clearly that the refusal of the workman was unreasonable. *Proprietors of Hays Wharf v. Brown* (1909), 3 B. W. C. C. 84. The onus rests upon the employer to show that a workman unreasonably refused to submit to an operation whereby it is alleged that the operation would have cured the disability. *Marshall v. Orient Steam Navigation Co.* (1910), 1 K. B. 79; 3 B. W. C. C. 15. So held where a ship's fireman whose finger was injured refused to have an incision made as advised by the ship's doctor, who declared that such an incision would have saved the finger, and the workman's doctor declared to the contrary. *Id.* The refusal by a workman to undergo a surgical operation must be reasonable or he will not be entitled to a continuance of the compensation awarded. *Paddington Borough Council v. Stack* (1909), 2 B. W. C. C. 402. Where a workman refuses to submit to a surgical operation of a simple character, involving no serious risk to life and health, and which, according to the unanimous professional evidence, offers a reasonable prospect of the

removal of the incapacity from which he suffers, is debarred from any right to claim further compensation. Such continuance of his disability is not attributable to the original accident, but to his unreasonable refusal to avail himself of surgical treatment. *Warncken v. Richard Moreland & Son* (1908), 100 L. T. 12; 2 B. W. C. C. 350. A workman injured by accident arising out of and in the course of his employment, who refuses, on the advice of his own doctor, to submit to a surgical operation, which, in the opinion of such medical man, involved some risk to his life, is not acting unreasonably in such refusal, and is not thereby precluded from claiming compensation because of his continued disability to work. *Tutton v. Owners of Steamship "Majestic"* (1909), 100 L. T. 644; 2 B. W. C. C. 346.

5. Medical referee's report not conclusive on arbitrator.

Where the County Court judge submits to a medical referee for report any matter which seems material to any question arising in the arbitration the judge is not bound by the referee's report, but should exercise an independent judgment. *Quinn v. Flynn* (1910), 44 Irish L. T. R. 183; 3 B. W. C. C. 594.

CALIFORNIA

(L. 1911, c. 399)

"§ 11. Wherever in case of injury the right to compensation under this act would exist in favor of any employé, he shall, upon the written request of his employer, submit from time to time to examination by a regular practicing physician, who shall be provided and paid for by the employer, and shall likewise sub-

Illinois

mit to examination from time to time by any regular physician selected by said Industrial Accident Board, or any member or examiner thereof. The employé shall be entitled to have a physician provided and paid for by himself present at any such examination. So long as the employé, after such written request of the employer, shall refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended, and if he shall refuse to submit to such examination after direction by the board, or any member or examiner thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. Any physician who shall make or be present at any such examination may be required to testify as to the results thereof."

ILLINOIS

(L. 1911, c. 000)

"§ 9. Any employé entitled to receive disability payments shall be required if requested by the employer to submit himself for examination at the expense of the employer to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employé, as soon as practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks, which examinations shall be for the purpose of determining the nature, extent and probable duration of the injury received by the employé, and for the purpose of adjusting the compensation which may be due the employé from time to time for disability according

Kansas

to the provisions of Sections 4 and 5 of this Act: PROVIDED, HOWEVER, that such examination shall be made in the presence of a duly qualified medical practitioner or surgeon provided and paid for by the employé, if such employé so desires, and in the event of a disagreement between said medical practitioners or surgeons as to the nature, extent or probable duration of said injury or disability, they may agree upon a third medical practitioner or surgeon, and, failing to agree upon such third medical practitioner or surgeon, the judge of the county court of the county where the employé resided or was employed at the time of the injury, shall within six days after petition filed in such court for that purpose, select a third medical practitioner or surgeon and the majority report of such three physicians as to the nature, extent and probable duration of such injury or disability shall be used for the purpose of estimating the amount of compensation payable under this Act. If the employé refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act during such period."

KANSAS

(L. 1911, c. 218)

"§ 17. *Medical examination.* (a) After an injury to the employé, if so requested by his employer, the employé must submit himself to examination at some reasonable time to a reputable physician selected by the employer, and from time to time thereafter during the pendency of his claim for compensation, or during the receipt by him for payment under this act, but he shall not be required to so submit himself, more than

Kansas

once in two weeks unless in accordance with such orders as may be made by the proper court or judge thereof. Either party may upon demand require a report of any examination made by the physician of the other party upon payment of a fee of one dollar therefor. (b) If the employé request he shall be entitled to have a physician of his own selection present at the time to participate in such examinations. (c) Unless there has been a reasonable opportunity thereafter for such physician selected by the employé to participate in the examination in the presence of the physician selected by the employer, the physician selected by the employer shall not be permitted afterwards to give evidence of the condition of the employé in a dispute as to the injury. (d) Except as provided herein in this act there shall be no other disqualification or privilege preventing the testimony of a physician who actually makes an examination."

"§ 18. *Medical examination by neutral physician.* In case of a dispute as to the injury, the committee, or arbitrator as hereinafter provided, or the judge of the district court shall have the power to employ a neutral physician of good standing and ability, whose duty it shall be, at the expense of the parties to make an examination of the injured person, as the court may direct, on the petition of either or both the employer and employé or dependents."

"§ 19. *Testimony by court physician.* If the employer or the employé has a physician make such an examination and no reasonable opportunity is given to the other party to have his physician make examination, then, in case of a dispute as to the injury, the physician of the party making such examination shall not give evidence before the court unless a neutral physician either has examined or then does examine

Massachusetts

the injured employé and give testimony regarding the injuries."

"§ 20. *Refusal of medical examination.* If the employé shall refuse examination by physician selected by the employer with the presence of a physician of his own selection, and shall refuse an examination by the physician appointed by the court, he shall have no right to compensation during the period from refusal until he, or some one in his behalf, notifies the employer or the court that he is willing to have such examination."

"§ 21. *Certificate of physician.* A physician making an examination shall give to the employer and to the workman a certificate as to the condition of the workman, but such certificate shall not be competent evidence of that condition unless supported by his testimony if his testimony would have been admissible."

MASSACHUSETTS

(L. 1911, c. 751)

"Part II, § 19. After an employé has received an injury and from time to time thereafter during the continuance of his disability he shall, if so requested by the association or subscriber, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the commonwealth, furnished and paid for by the association or subscriber. The employé shall have the right to have a physician provided and paid for by himself present at the examination. If he refuses to submit himself for the examination, or in any way obstructs the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited." (As amended by L. 1912, c. 571.)

Nevada

MICHIGAN

(L. 1912, c. 000)

"Part II, § 19. After an employé has given notice of an injury, as provided by this act, and from time to time thereafter during the continuance of his disability, he shall, if so requested by the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be. The employé shall have the right to have a physician provided and paid for by himself present at the examination. If he refuses to submit himself for the examination, or in any way obstructs the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited. Any physician who shall make or be present at any such examination may be required to testify under oath as to the results thereof.

"Part III, § 9. The industrial accident board or any member thereof may appoint a duly qualified impartial physician to examine the injured employé and to report. The fee for this service shall be five dollars and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases."

NEVADA

(L. 1911, c. 183)

"§ 7. Any workman entitled to receive weekly payments under this Act is required, if requested by

New Jersey

the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within three weeks after the injury, and thereafter at intervals not oftener than once in six weeks. A copy of the report of the examining physician shall be furnished to the workman. * * *” For remainder of this section see Chapter XXIV, *post*, page 426. The subsequent portions of the section apply only to settlements of disputes.

NEW HAMPSHIRE

(L. 1911, c. 000)

“§ 7. Any workman entitled to receive weekly payments under this Act is required, if requested by the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within two weeks after the injury, and thereafter at intervals not oftener than once in a week. If the workman refuses to submit to such examination, or obstructs the same, his right to weekly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.”

NEW JERSEY

(L. 1911, c. 95)

“§ 2-17. Examination of employé as to physical condition. After an injury, the employé, if so requested by his employer, must submit himself for examination at some reasonable time and place

Rhode Island

within the State, and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this State. If the employé requests, he shall be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employé to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect of the period of suspension."

OHIO

(L. 1911, c. 000)

There is no specific provision on this subject in the Ohio Statute, but doubtless the State Liability Board of Awards has power to make regulations concerning it. See Chapter XXIV, *post*, page 432.

RHODE ISLAND

(L. 1912, c. 000)

"Art. II, § 21. *Examination of injured.* The employé shall, after an injury, at reasonable times during the continuance of his disability, if so requested by his employer, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer. The employé shall have the right to have a physician, provided and paid for by himself, present at such examination.

"Any justice of the superior court may, at any time after an injury, on the petition of the employer or employé, appoint a competent and impartial phy-

sician or surgeon to act as a medical examiner, and the reasonable fees of such medical examiner as fixed by the justice appointing him shall be paid by the party moving for such appointment.

"Such medical examiner being first duly sworn to the faithful performance of his duties before the justice appointing him or clerk of the court shall thereupon, and as often as necessary, examine such injured employé in order to determine the nature, extent, and probable duration of the injury. Such medical examiner shall file a report of every examination made of such employé in the office of the clerk of the superior court having jurisdiction of the matter as provided in section 16 of Article III of this act, and such report shall be produced in evidence in any hearing or proceeding to determine the amount of compensation due such employé under the provisions of this act. If such employé refuses to submit himself for any examination provided for in this act, or in any way obstructs any such examination, his rights to compensation shall be suspended and his compensation during such period of suspension may be forfeited."

WASHINGTON

(L. 1911, c. 74)

"§ 13. *Medical Examination.* Any workman entitled to receive compensation under this Act is required, if requested by the department, to submit himself for medical examination at a time and from time to time at a place reasonably convenient for the workman and as may be provided by the rules of the department. If the workman refuses to submit to any such examination, or obstructs the same, his rights to monthly payments shall be suspended un-

Wisconsin

til such examination has taken place, and no compensation shall be payable during or for account of such period."

WISCONSIN

(L. 1911, c. 50)

"§ 2394-12. Wherever in case of injury the right to compensation under this Act would exist in favor of any employé, he shall, upon the written request of his employer, submit from time to time to examination by a regular practicing physician, who shall be provided and paid for by the employer, and shall likewise submit to examination from time to time by any regular physician selected by said industrial accident board, or a member or examiner thereof. The employé shall be entitled to have a physician, provided and paid for by himself, present at any such examination. So long as the employé, after such written request of the employer, shall refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended; and if he shall refuse to submit to such examination after direction by the board, or any member or examiner thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. Any physician who shall make or be present at any such examination may be required to testify as to results thereof."

CHAPTER XXIV

BY WHOM LAW ADMINISTERED AND HOW AWARDS DETERMINED; FORMS OF PETITIONS, ANSWERS AND AWARDS

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Appointment of guardian of incompetent

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1. Liberal rules as to procedure.

Documents in arbitration proceedings under the Act should not be treated with the nicety and strictness of pleadings in judicial proceedings in the higher court. *Lowe v. M. Myers & Sons* (1906), 2 K. B. 265; 8 W. C. C. 22.

2. Right of workman to take out letters of administration on estate of deceased employer.

Where an employer against whom compensation had been awarded died, and his next of kin refused to take out letters of administration, it was held that the workman who was entitled to compensation could apply to have such letters taken out. *Matter of William Byrne, Deceased* (1910), 44 Irish L. T. 98; 3 B. W. C. C. 591.

3. Specifying amount when making claim for compensation.

It is unnecessary, in making a claim under the Workmen's Compensation Act, to specify the amount claimed. *Thompson v. R. W. Gould & Co.* (1910), A. C. 409; 103 L. T. 81; 3 B. W. C. C. 392. The last-mentioned case was decided by the House of Lords.

4. Necessity of appointment of guardian ad litem when interests of incompetent involved.

Proceedings under the Workmen's Compensation

Act in respect of the death of a workman, were brought on behalf of A, a daughter, who had been residing with him and acting as his housekeeper, and B, his wife, who was then, and had been for many years, an inmate of the district lunatic asylum. The matter was settled as between the employer and A by the employer agreeing to pay £100, which was lodged in court. No guardian *ad litem* to B having been appointed, an application was made by the resident medical superintendent of the asylum of which B was an inmate, to have the said sum of £100 apportioned between A and B, on the bases of both of them being dependents of the deceased. It was held on appeal that as no guardian *ad litem* had been appointed for the lunatic neither the respondent nor the lunatic were before the court and there was no jurisdiction to make any order. *Kerr and another v. Stewart* (1909), 43 Irish L. T. 119; 2 B. W. C. C. 454.

5. Agreement to pay compensation is not a consent to submit to arbitration.

On an application to register a memorandum of agreement to pay compensation the judge has no power to alter the amount and treat that agreement as a submission by the employer to pay any sum the judge thinks reasonable. *Hall v. Furness, Withy & Co.* (1909), 3 B. W. C. C. 72. When a memorandum of agreement has been presented to be recorded, the judge has no power to do more than declare whether or not the memorandum is one which ought to be recorded and he has no power to make any substantive order dealing with the whole matter, or to treat the agreement as a submission by the employer to pay any sum

Burden of proof

which the judge under the circumstances may think just and proper. *Mortimer v. Secretan* (1909), 100 L. T. 721; 2 B. W. C. C. 446.

6. Agreement for compensation bar to arbitration proceedings.

An implied agreement for compensation is a bar to proceedings in arbitration. *Busby v. Richardson* (1901), 3 W. C. C. 54.

7. Effect of agreement to pay compensation "during incapacity."

Where an agreement has been entered into, whereby the employers agree to pay compensation "during the time of the incapacity of the workman," and the employers thereafter cease payments, the employers may show in any proceeding by the workman to recover compensation for the period subsequent to the time of suspension of payments, that the incapacity ceased when the payments were discontinued. *Ibrahim Said v. J. H. Welsford & Co.* (1910), 3 B. W. C. C. 233.

8. Amending pleadings by arbitrator.

Under the British Columbia Compensation Act of 1902 an arbitrator has the same power to amend pleadings in the proceeding as a judge has in a civil action. *Moore v. Crow's Nest Pass Coal Company* (1910), 15 Br. C. R. 391; 4 B. W. C. C. 451.

9. Burden of proving the injury was caused by accident is on the workman.

A collier died of apoplexy during work hours in a mine. The majority of the doctors said that his arteries

Inferences in the absence of direct proof

were in a very diseased condition, and that apoplexy might have come upon him when asleep in bed, or when walking about, or when over-exerting himself. There was no evidence that the apoplexy came upon him when he was incurring a strain. It was held that as the evidence as to the cause of death was equally consistent with an accident, and with no accident, the applicants for compensation had not discharged the onus of proving it, which was upon them. *Barnabas v. Bersham Colliery Co.* (1910), 102 L. T. R. 621; 3 B. W. C. C. 216. Where a bus driver fell from the bus and there was conflicting medical evidence as to the cause of death, it was held that the burden was on the dependent to prove that death was caused by accident, and as this burden had not been sustained compensation was refused. *Thackway v. Connelly and Sons* (1909), 3 B. W. C. C. 37. In the last-mentioned case the court laid down the rule, citing several other decisions, that it is incumbent upon the plaintiff to make out that the accident in respect of which compensation is claimed, arose out of and in the course of the injured man's employment, not upon the employer to prove the contrary.

10. Inferences in the absence of direct proof.

Even though there is no direct evidence that an injury to a workman arose out of and in the course of his employment an inference to this effect may be drawn where the known facts are more consistent with the theory that the injury did so arise than with the theory that the accident occurred in some other manner. *Mitchell v. Glamorgan Coal Co.* (1907), 23 T. L. R. 588; 9 W. C. C. 16. In the case last cited the workman, a

Inference in the absence of direct proof

miner, returned home in his working clothes, with one finger crushed. The applicant for compensation dressed the wound and the workman returned to work for a few days when blood poisoning set in and he died. The court held that while it was possible that the workman was injured on his way home the court would be justified on the facts stated to draw the inference that the workman was injured in the course of his employment.

A man of seventy was employed at an undertaker's, part of his duty being to lift coffins. He went to work one day apparently well, and on his return home complained to his wife of having been hurt that day; there were marks upon his side and chest, and his leg was swollen. He died about a week afterward, from pneumonia supervening on pleurisy caused by injury. There was no direct evidence showing that an accident had been sustained by the deceased in the course of his employment. It was held that there was evidence to support the inference that the man died from accident. *Wright v. Kerrigan* (1911), 45 Irish L. T. 82; 4 B. W. C. C. 432. In this case one of the judges said as to the admissibility of statements made by a deceased to his doctor, with regard to his bodily injuries and their immediate cause: "Such statements are invariably admitted on various grounds, the chief of which is that there is no other possible evidence. Those statements made, not necessarily to a doctor, but to any person, as to bodily injuries, are admissible."

The chief officer of a steam vessel fell overboard between 7 and 8 A. M. on a fine morning, at a time when he was on duty and in charge of the vessel on deck. No one saw him fall overboard. Before 7 A. M. and during

Inferences in the absence of direct proof

his watch, which commenced at 4 A. M., he had gone below complaining of a headache and giddiness, and had taken a dose of castor oil, but had returned to his duty on deck. The County Court judge, in the absence of direct evidence as to how the accident happened, inferred that it arose out of, as well as in the course of the employment. It was held that the judge was justified by the balance of the probability in drawing this inference. *Owners of Steamship "Swansea Vale" v. Rice* (1911), 104 L. T. 658; 4 B. W. C. C. 298.

The fact of a seaman's disappearance from his vessel, and his unexplained drowning, does not raise a *prima facie* inference that he met with an accident arising out of as well as in the course of his employment. A sailor having gone on deck from his cabin in the course of his employment on a hot night for the purpose of getting some fresh air, disappeared, and the next day his body was found in the tidal basin close to the ship. It was held that the applicant had not complied with the onus resting upon her of proving that the accident arose out of as well as in the course of the employment, and she was not entitled to compensation. *Marshall v. Owners of Ship "Wild Rose"* (1909), 100 L. T. 739; 2 B. W. C. C. 76.

A workman received an injury in the course of his employment, which necessitated the amputation of one of his fingers. He was put under anæsthetics and the finger was amputated. As he was recovering from the effects of the anæsthetics the surgeons decided to remove a bad tooth of which the workman had complained; further anæsthetics were administered, and an unsuccessful attempt was made to remove the tooth. The workman shortly afterwards died. It was

Evidence

held that it was as probable that death resulted from a spasm induced by an attempt to swallow oozing blood in his mouth, as that it resulted from the anæsthetic for the first operation, and consequently that the widow had not discharged the onus which rested upon her of proving that the workman's death resulted from his injury by the accident. *Charles v. Walker* (1909), 25 T. L. R. 609; 2 B. W. C. C. 5.

A sailor on board ship in a harbor went on deck late at night to get some fresh air. He was found dead in the water in the morning. It was held that the mere fact of a seaman disappearing from his ship and being found drowned alongside is not sufficient to discharge the onus of proving that the accident arose out of the employment. (House of Lords), *Marshall v. Owners of Ship "Wild Rose"* (1910), 3 B. W. C. C. 514.

11. Burden of proof as to serious and willful misconduct.

The burden of proving that the workman has been guilty of serious and willful misconduct is on the employer who sets it up as a reason for refusing compensation. *Johnson v. Marshall, Sons & Co.* (1906), 94 L. T. 828; 8 W. C. C. 10.

12. Evidence.

The statement made by an employé in the absence of his employer, by a deceased man, as to his bodily or mental feelings, are admissible in evidence, but those made as to the cause of his illness are not admissible in evidence and where there is no other evidence of an accident arising out of and in the course of the employment than statements made by a deceased em-

Findings of fact; evidence to support

ployé in the absence of his employer, an award cannot be sustained. *Gilbey v. The Great Western Railway Co.* (1910), 102 L. T. 202; 3 B. W. C. C. 135. A statement made by a deceased workman to a fellow workman as to the cause of the injury he received, is not admissible in evidence. *Penn v. Spiers & Pond* (1908), 1 B. W. C. C. 401. But see *Wright v. Kerrigan* (1911), 45 Irish L. T. 82; 4 B. W. C. C. 432, referred to *ante*, page 401.

13. Sufficiency of finding of incapacity.

A finding that a workman was incapacitated "for work at his trade of stone breaking by the loss of an eye" was held to be in effect a finding that he was incapacitated "for work." *Boyd v. Doharty* (1908), 46 Scotch L. R. 71; 2 B. W. C. C. 257.

14. Finding on question of fact as to which there is any evidence to support.

A workman while engaged in carrying joists for a house, fainted, and subsequently died. Medical witnesses for the workman gave it as their opinion that death was due to rupture of the heart caused by the work, while medical witnesses for the employers gave it as their opinion that death was due to heart disease. The arbitrator, in consequence of this evidence, submitted the matter to a medical referee to report. The medical referee reported that the workman died from disease of the heart. The arbitrator found that the workman died from a rupture of the heart, caused by the strain of the work and awarded compensation. It was held that the arbitrator was not bound to accept the medical referee's report as conclusive, and that,

Findings of fact; evidence to support

as there was some evidence to justify the award, it must stand. *Scotstoun Estate Co. v. Jackson* (1911), 48 Scotch L. R. 440; 4 B. W. C. C. 381. In the last-mentioned case the court said: "There is nothing in the statute that in any way absolves the arbitrator from his duty as arbitrator. It is only a report that he gets from the medical referee, and therefore I think it would be impossible to affirm that the arbitrator was bound to accept the medical referee's report or opinion, that is to say, to accept it as conclusive of the whole matter. He gets a report, and must weigh that report just as he weighs the rest of the evidence."

A collier was injured in 1903, and after five months' absence returned to work; some of the work he then did was heavier than his work before the accident. He was dismissed in 1909, and claimed compensation on the ground that the consequences of his injury prevented him from obtaining work. The medical evidence was conflicting, and the case was referred to a medical referee, who reported that the man was fit for full work, but more liable to strains than before the accident. On this report the County Court judge made an award of one penny a week. It was held on appeal that the matter was a pure question of fact and that there was evidence to justify the County Court judge's award. *Wells v. Cardiff Steam Coal Collieries Co.* (1909), 3 B. W. C. C. 104.

A workman while engaged in laying drain pipes, was struck on the back by a stone and was injured. A day or two afterwards he was seen by a doctor, who diagnosed pneumonia, and sent him to a hospital, where he remained for three days, when he insisted on being taken home. He was accordingly assisted home, a dis-

Suspensory award

tance of some ten minutes' walk, by some neighbors. This was done in spite of warning by the doctor in attendance at the hospital that such a course was dangerous to life. He died two days afterward. Upon an application by his widow for compensation the arbitrator found that death resulted from the accident. It was held that there was evidence to support the finding. *Dunnigan v. Cavan & Lind* (1911), 48 Scotch L. R. 459; 4 B. W. C. C. 386.

An injured workman was paid compensation for sixty-one weeks by his employers. Subsequently the employers offered the workman light work, which he refused, without attempting to do it. The County Court judge held that the workman had acted unreasonably in refusing to go and see what the work offered was, and that, if he had accepted the offer and returned to work, by the date of the arbitration he would have been under no disability. He therefore stopped compensation, but made a declaration of liability. It was held on appeal that the decision was on a question of fact, and that there was evidence to support it. *Furness, Withy & Co. v. Bennett* (1910), 3 B. W. C. C. 195.

Where the County Court judge holds that the workman is shamming, and there is evidence to support the decision, this is a question of fact with which the Court of Appeal will not interfere. *Roberts v. Benham* (1910), 3 B. W. C. C. 430.

15. Suspensory award.

A suspensory award should be made where, although the man can work, yet the bad effects of the accident still remain. So held, where a seaman was ruptured and a medical referee reported that he was fit for his full

Enforcing payment of award; body execution

work but must wear a truss. *Griga v. Owners of Ship "Harelda"* (1910), 26 T. L. R. 272; 3 B. W. C. C. 116.

16. Award to terminate at specified date in future.

The judge has no power to make an award which shall continue for a certain length of time and then terminate on a date mentioned in the future. *Baker v. Jewell* (1910), 3 B. W. C. C. 503.

17. Admission in answer that compensation has been paid amounts to admission of claim made.

A statement in an answer that compensation has been paid is an admission of fact and evidence that a claim has been made. *Lowe v. Myers & Son* (1906), 95 L. T. 35; 8 W. C. C. 22.

18. Apportioning compensation among dependents; procedure.

Where an employer has agreed with dependents as to the amount of compensation, arbitration under the Act, naming the employer as respondent, is not necessary to enable such amount to be apportioned among the dependents of the deceased, but the sum should be brought in and lodged in the County Court to the credit of the applicants and respondents. *Harland & Wolff v. Radcliffe* (1909), 43 Irish L. T. 166; 2 B. W. C. C. 374; *Rhodes v. Soothill Wood Colliery Co.* (1908), 100 L. T. 15; 2 B. W. C. C. 377.

19. Enforcing payment of award; body execution.

A committal order on a judgment summons can be made in order to enforce an award. *Johnson v. Adshhead*, 2 W. C. C. 158. An award for compensation may

be enforced by a committal order under the Debtor's Act. *Bailey v. Plant* (1900), 3 W. C. C. 209.

20. New trial; arbitrator cannot grant.

An arbitrator has no power to grant a rehearing in the nature of a new trial of an action after he has made his award, as he sits as an arbitrator and not as a judge. *Mountain v. Parr* (1899), 80 L. T. 342; 1 W. C. C. 110.

CALIFORNIA

(L. 1911, c. 399)

“§ 12. Any dispute or controversy concerning compensation under this Act, including any in which the State may be a party, shall be submitted to a board consisting of three members, which shall be known as the industrial accident board. Within thirty days before this Act shall take effect, the governor, by and with the advice and consent of the senate, shall appoint a member who shall serve two years, and another who shall serve three years, and another who shall serve four years. Thereafter such three members shall be appointed and confirmed for terms of four years each. Vacancies shall be filled in the same manner for the unexpired term. Each member of the board, before entering upon the duties of his office, shall take the oath prescribed by the constitution. A majority of the board shall constitute a quorum for the exercise of any of the powers or authority conferred by this Act, and an award by a majority shall be valid. In case of a vacancy, the remaining two members of the board shall exercise all the powers and authority of the board until such vacancy is filled. Each member of the board

California

shall receive an annual salary of three thousand six hundred dollars."

"§ 13. The board shall organize by choosing one of its members as chairman. Subject to the provisions of this Act, it may adopt its own rules of procedure and may change the same from time to time in its discretion. The board, when it shall deem it necessary to expedite its business, may from time to time employ one or more expert examiners for such length of time as may be required. It may also appoint a secretary and such clerical help as it may deem necessary. It shall fix the compensation of all assistants so appointed."

"§ 14. The board shall keep its office at the city of San Francisco, and shall be provided by the secretary of state with a suitable room or rooms, necessary office furniture, stationery, and other supplies. The members of the board and its assistants, shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board, but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board, before payment is made. All salaries and expenses authorized by this Act shall be audited and paid out of the general funds of the state the same as other general state expenses are audited and paid."

"§ 15. Upon the filing with the board by any party in interest of an application in writing stating the general nature of any dispute or controversy concerning compensation under this act, it shall fix a time for the hearing thereof, which shall not be more than forty days after the filing of such application. The board shall cause notice of such hearing to be given to each party interested by service of such notice on

him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the board, and hearings shall be held at such places as the board shall designate. Either party shall have the right to be present at any hearing, in person or by attorney or any other agent, and to present such testimony as shall be pertinent to the controversy before the board, but the board may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be had, or the time books and payroll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time, direct any employé claiming compensation to be examined by a regular physician; the testimony so taken and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing. The board, or any member thereof, or any examiner appointed thereby shall have power and authority to issue subpoenas to compel the attendance of witnesses or parties, and the production of books, papers, or records, and to administer oaths. Obedience to such subpoenas shall be enforced by the superior court of any county, or city and county.

“§ 16. After final hearing by said board, it shall make and file (1) its findings upon all facts involved in the controversy, and (2) its awards, which shall state its determination as to the rights of the party.

“§ 17. Either party may present a certified copy of the award to the superior court for any county or city and county, whereupon said court shall, without notice, render a judgment in accordance therewith, which judgment, until and unless set aside as herein-

Illinois

after provided, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with the like effect, be entered and docketed."

ILLINOIS

(L. 1911, c. 000)

"§ 10. Any question of law or fact arising in regard to the application of this law in determining the compensation payable hereunder shall be determined either by agreement of the parties or by arbitration as herein provided. In case any such question arises which cannot be settled by agreement, the employé and the employer shall each select a disinterested party and the judge of the county court or other court of competent jurisdiction, of the county where the injured employé resided or worked at the time of the injury, shall appoint a third disinterested party, such persons to constitute a Board of Arbitrators for the purpose of hearing and determining all such disputed questions of law or fact arising in regard to the application of this law in determining the compensation payable hereunder; and it shall be the duty of both employé and employer to submit to such Board of Arbitrators not later than ten days after the selection and appointment of such arbitrators all facts or evidence which may be in their possession or under their control, relating to the questions to be determined by said arbitrators; and said Board of Arbitrators shall hear all the evidence submitted by both parties and they shall have access to any books, papers or records of either the employer or the employé showing any facts which may be material to the questions before them, and they shall be em-

Kansas

powered to visit the place or plant where the accident occurred, to direct the injured employé to be examined by a regular practicing physician or surgeon, and to do all other acts reasonably necessary for a proper investigation of all matters in dispute. A copy of the report of the arbitrators in each case shall be prepared and filed by them with the State Bureau of Labor Statistics, and shall be binding upon both the employer and employé except for fraud and mistake: PROVIDED, that either party to such arbitration shall have the right to appeal from such report or award of the arbitrators to the Circuit Court or the court that appointed the third arbitrator of the county where the injury occurred by filing a petition in such court within twenty days after the filing of the report of the arbitrators, and upon filing a good and sufficient bond in the discretion of the court, and upon such appeal the questions in dispute shall be heard *de novo*, and either party may have a jury upon filing a written demand therefor with his petition."

KANSAS

(L. 1911, c. 218)

"§ 23. *Agreements.* Compensation due under this Act may be settled by agreement. Every such agreement, other than a release, shall be in the form hereinafter provided."

"§ 24. *Arbitrations.* If compensation be not so settled by agreement: (a) If any committee representative of the employer and the workman exists, organized for the purpose of settling disputes under this Act, the matter shall, unless either party objects by notice in writing delivered or sent by registered

Kansas

mail to the other party before the committee meets to consider the matter, be settled in accordance with its rules by such committee or by an arbitrator selected by it. (b) If either party so objects, or there is no such committee, or the committee or the arbitrator to whom it refers the matter fails to settle it within sixty days from the date of the claim, the matter may be settled by a single arbitrator agreed upon by the parties, or appointed by any judge of a court where an action might be maintained. The consent to arbitration shall be in writing and signed by the parties and may limit the fees of the arbitrator and the time within which the award must be made. And unless such consent and the order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue.

"§ 25. *The duties of arbitrator.* The arbitrator shall not be bound by technical rules of procedure or evidence, but shall give the parties reasonable opportunity to be heard and act reasonably and without partiality. He shall make and file his award with the consent to arbitration attached in the office of the clerk of the proper district court within the time limited in the consent, or if no time limit is fixed therein, within sixty days after his selection, and shall give notice of such filing to the parties by mail.

"§ 26. *Arbitrator's fees.* The arbitrator's fees shall be fixed by the consent to arbitration or be agreed to by the parties before the arbitration, and if not so fixed or agreed to, they shall not exceed \$10.00 per day, for not to exceed ten days, and disbursements for expense. The arbitrator shall tax or apportion the costs of such fees in his discretion and shall add the amount taxed or apportioned against the employer

to the first payment made under the award, and he shall note the amount of his fees on the award and shall have a lien therefor on the first payments due under the award.

"§ 27. *Form of agreements and award.* Every agreement for compensation and every award shall be in writing, signed and acknowledged by the parties or by the arbitrator or secretary of the committee hereinbefore referred to, and shall specify the amount due and unpaid by the employer to the workman up to the date of the agreement or award, and if any, the amount of the payments thereafter to be paid by the employer to the workman and the length of time such payments shall continue."

"§ 28. *Filing agreements, awards, etc.* It shall be the duty of the employer to file or cause to be filed every release of liability hereunder, every agreement for or award of compensation, or modifying an agreement for or award of compensation, under this Act, if not filed by the committee or arbitrator, to which he is a party, or a sworn copy thereof, in the office of the district court in the county in which the accident occurred within sixty days after it is made, otherwise it shall be void as against the workman. The said clerk shall accept, receipt for, and file any such release, agreement or award, without fee, and record and index it in the book kept for that purpose. Nothing herein shall be construed to prevent the workman from filing such agreement or award."

"§ 30. *Staying proceedings upon agreement or award.* At any time after the filing of an agreement or award and before judgment has been granted thereon, the employer may stay proceedings thereon by filing in the office of the clerk of the district court wherein such agreements or award is filed: (a) A proper

Kansas

certificate of a qualified insurance company that the amount of the compensation to the workman is insured by it: (b) A proper bond undertaking to secure the payment of the compensation. Such certificate or bond shall first be approved by a judge of the said district court."

"§ 35. *Courts.* All references hereinbefore to a district court of the State of Kansas having jurisdiction of a civil action between the parties shall be construed as relating to the then existing code of civil procedure. Such court shall make all rules necessary and appropriate to carry out the provisions of this Act."

"§ 36. *Actions.* A workman's right to compensation under this Act, may, in default of agreement or arbitration, be determined and enforced by action in any court of competent jurisdiction. In every such action the right to trial by jury shall be deemed waived and the case tried by the court without a jury, unless either party, with his notice of trial, or when the case is placed upon the calendar—demand a jury trial. The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under this Act, with interest on the payments overdue, or, in the discretion of the trial judge, for periodical payments as in an award. Where death results from injury, the action shall be brought by the dependent or dependents entitled to the compensation or by the legal representative of the deceased for the benefit of the dependents as herein defined; and in such action the judgment may provide for the proportion of the award to be distributed to or between the several dependents; otherwise such proportions shall be determined by the proper probate court. An action

Massachusetts

to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with an action for compensation under this Act. No action or proceeding provided for in this Act shall be brought or maintained outside of the State of Kansas, and notice thereof may be given by publication against nonresidents of the state in the manner now provided by article 7 of chapter 95, General Statutes of Kansas of 1909 so far as the same may be applicable, and by personal service of a true copy of the first publication within twenty-one days after the date of the said first publication unless excused by the court upon proper showing that such service cannot be made."

MASSACHUSETTS

(L. 1911, c. 751)

The Massachusetts plan is peculiar to that Commonwealth. It is not state insurance, like that prevailing in the State of Washington. On the other hand, an employer cannot embrace the compensation principle as to his own employés and have any individual control over the administration of the payments of compensation under the statute. The Act provides for the incorporation of a mutual association known as the Massachusetts Employees' Insurance Association. It is entirely self sustaining both as to administration expenses and the sums paid by way of compensation to injured workmen. Its income is derived from premiums, or assessments, collected from employers. The first directors are appointed by the Governor. Subsequently they are elected from among the subscribing employers. Any employer in the Commonwealth of

Massachusetts

Massachusetts may become a subscriber. While the Association is charged with the obligation to raise funds to pay administration expenses and awards of compensation to the injured workmen of its subscribers, it has no direct voice in making the payments to such workmen. These awards are all determined upon under the virtual direction of the Industrial Accident Board, a state institution, the members of which are appointed by the Governor with the advice and consent of the Council. The Association and an injured workman cannot even agree upon the amount of an award for compensation without the approval of the Industrial Accident Board. (Part III, § 4.) In case of disagreement between the Association and the workman three arbitrators, one of whom must be, and all of whom may be, members of the Industrial Accident Board, are appointed to determine the controversy. From an award made by these arbitrators an appeal lies as in cases of judgments of the Superior Court. "Any weekly payment under this Act may be reviewed by the Industrial Accident Board at the request of the Association or of the employé; and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the condition of the employé warrants such action." Part III, § 12.

"PART III

"PROCEDURE

"§ 1. There shall be an industrial accident board consisting of five members, to be appointed by the governor, by and with the advice and consent of the

Massachusetts

council, one of whom shall be designated by the governor as chairman. The term of office of members of this board shall be five years, except that when first constituted one member shall be appointed for one year, one for two years, one for three years, one for four years, and one for five years. Thereafter one member shall be appointed every year for the full term of five years. (As amended by L. 1912, c. 571.)

“§ 2. The salaries and expenses of the board shall be paid by the commonwealth. The salary of the chairman shall be five thousand dollars a year, and the salary of the other members shall be forty-five hundred dollars a year each. The board may appoint a secretary at a salary of not more than three thousand dollars a year, and may remove him. It shall also be allowed an annual sum, not exceeding ten thousand dollars, for clerical service, and traveling and other necessary expenses. The board shall be provided with an office in the state house or in some other suitable building in the city of Boston, in which its records shall be kept. (As amended by L. 1912, c. 571.)

“§ 3. The board may make rules not inconsistent with this Act for carrying out the provisions of the Act. Process and procedure under this Act shall be as summary as reasonably may be. The board or any member thereof shall have the power to subpoena witnesses, administer oaths and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. The fees for attending as a witness before the industrial accident board shall be one dollar and fifty cents a day; for attending before an arbitration committee fifty cents a day; in both cases five cents a mile for travel out and home.

Massachusetts

"The superior court shall have power to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records,—so as to read as follows: Section 3. The board may make rules not inconsistent with this act for carrying out the provisions of the act. Process and procedure under this act shall be as summary as reasonably may be. The board or any member thereof shall have the power to subpoena witnesses, administer oaths and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. The fees for attending as a witness before the industrial accident board shall be one dollar and fifty cents a day, for attending before an arbitration committee fifty cents a day; in both cases five cents a mile for travel out and home.

"The superior court shall have power to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records." (As amended by L. 1912, c. 571.)

"§ 4. If the association and the injured employé reach an agreement in regard to compensation under this Act, a memorandum of the agreement shall be filed with the industrial accident board and, if approved by it, thereupon the memorandum shall for all purposes be enforceable under the provisions of Part III, section eleven. Such agreements shall be approved by said board only when the terms conform to the provisions of this Act. (As amended by L. 1912, c. 571.)

"§ 5. If the association and the injured employé fail to reach an agreement in regard to compensation under this Act, either party may notify the industrial

Massachusetts

accident board who shall thereupon call for the formation of a committee of arbitration. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board, and shall act as chairman. The other two members shall be named, respectively, by the two parties. If the subscriber has appeared under the provisions of Part II, section three, the member named by the association shall be subject to his approval. If a vacancy occurs it shall be filled by the party whose representative is unable to act.

"The arbitrators appointed by the parties shall be sworn by the chairman as follows: I do solemnly swear that I will faithfully perform my duty as arbitrator and will not be influenced in my decision by any feeling of friendship or partiality toward either party. So help me God. (As amended by L. 1912, c. 571.)

"§ 6. It shall be the duty of the industrial accident board, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The board shall designate one of its members to act as chairman, and, if either party does not appoint its member on this committee within seven days after notification, as above provided, or after a vacancy has occurred the board or any member thereof shall fill the vacancy and notify the parties to that effect. (As amended by L. 1912, c. 571.)

"§ 7. The committee on arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the city or town where the injury occurred, and the decision of the committee, together with a

Massachusetts

statement of the evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it, shall be filed with the industrial accident board. Unless a claim for review is filed by either party within seven days, the decision shall be enforceable under the provisions of Part III, section eleven. (As amended by L. 1912, c. 571.)

"§ 8. The industrial accident board or any member thereof may appoint a duly qualified impartial physician to examine the injured employé and to report. The fee for this service shall be five dollars and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases.

"§ 9. The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial accident board or any member thereof may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the association, which shall deduct an amount equal to one-third of the sum from any compensation found due the employé.

"§ 10. If a claim for a review is filed, as provided in Part III, section seven, the board shall hear the parties and file its decision with the records of the proceedings.

"§ 11. There shall be a right of appeal to the supreme judicial court on questions of law, and the industrial accident board may report questions of law to the supreme judicial court for its determination.

"§ 12. Any weekly payment under this Act may be reviewed by the industrial accident board at the request of the association or of the employé; and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts

Michigan

above provided, if the board finds that the condition of the employé warrants such action."

"§ 16. All questions arising under this Act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the industrial accident board. The decisions of the industrial accident board shall for all purposes be enforceable as if they were decrees of the Superior Court."

MICHIGAN

(L. 1912, No. 3)

"PART III

"PROCEDURE

§ 1. There is hereby created a board which shall be known as the Industrial Accident Board, consisting of three members to be appointed by the governor, by and with the consent of the senate, one of whom shall be designated by the governor as chairman. Appointments to fill vacancies may be made during recesses of the senate, but shall be subject to confirmation by the senate at the next ensuing session of the legislature. The term of office of members of this board shall be six years, except that when first constituted one member shall be appointed for two years, one for four years, and one for six years. Thereafter one member shall be appointed every second year for the full term of six years. No more than two members of this board shall belong to the same political party.

"§ 2. The salary of each of the members so appointed by the governor shall be three thousand five hundred dollars per year. The board may appoint a secretary at a salary of not more than two thousand

Michigan

five hundred dollars a year, and may remove him. The board shall be provided with an office in the capitol, or in some other suitable building in the city of Lansing, in which its records shall be kept, and it shall also be provided with necessary office furniture, stationery and other supplies. It shall provide itself with a seal for the authentication of its orders, awards and proceedings, upon which shall be inscribed the words "Industrial Accident Board—Michigan—Seal." It shall employ such assistants and clerical help as it may deem necessary and fix the compensation of all persons so employed: Provided, That the average compensation paid to such employé shall not exceed one thousand dollars per annum for each person employed, and all such clerical assistants shall be subject to existing laws regulating the grading and compensation of department clerks. The members of the board and its assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board; but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board before payment is made.

"All such salaries and expenses when audited and allowed by the board of state auditors, shall be paid by the state treasurer out of the general fund, upon warrant of the auditor general.

§ 3. The board may make rules not inconsistent with this act for carrying out the provisions of the act. Process and procedure under this act shall be as summary as reasonably may be. The board or any member thereof shall have the power to administer oaths, subpoena witnesses and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Michigan

“§ 4. The board shall cause to be printed and furnish free of charge to any employer or employé such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of any employer who shall file a statement of election under this act, and the date of the filing thereof and its approval by such board, and a separate book in which shall be entered and indexed the name of every employer who shall file his notice of withdrawal of said election, and the date of the filing thereof; and books in which shall be recorded all orders and awards made by the board; and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause such notice of the fact to be given by requiring said employer to post such notice as hereinbefore provided; and the board shall likewise cause notice to be given of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and notices of withdrawal of election, and of the time of the filing of the same, shall conclusively be imputed to all employés.

“§ 5. If the employer, or the insurance company carrying such risk, or commissioner of insurance, as the case may be, and the injured employé reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the industrial accident board, and, if approved by it, shall be deemed final and binding upon the parties

Michigan

thereto. Such agreements shall be approved by said board only when the terms conform to the provisions of this act.

"§ 6. If the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, and the employé fail to reach an agreement in regard to compensation under this act, either party may notify the industrial accident board, who shall thereupon call for the formation of a committee of arbitration. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board, and shall act as chairman. The other two members shall be named respectively by the two parties.

"§ 7. It shall be the duty of the industrial accident board, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The board shall designate one of its members to act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, the board or any member thereof shall fill the vacancy and notify the parties to that effect.

"§ 8. The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the locality where the injury occurred, and the decision of the committee shall be filed with the industrial accident board. Unless a claim for a review is filed by either party within seven days, the decision shall stand as the decision of the industrial accident board: Provided, That said industrial accident board may, for sufficient cause shown, grant further time in which to claim such review.

Nevada

"§ 10. The arbitrators named by or for the parties to the dispute shall each receive five dollars a day for his services, but the industrial accident board or any member thereof may allow additional reasonable amounts in extraordinary cases. The fees of such arbitrators and other costs of such arbitration, not exceeding, however, the taxable costs allowed in suits at law in the circuit courts of this state, shall be fixed by the board and paid by the state as the other expenses of the board are paid. The fees and the payment thereof of all attorneys and physicians for services under this act shall be subject to the approval of the industrial accident board.

"§ 16. All questions arising under this act, if not settled by agreement by the parties interested therein, shall except as otherwise herein provided, be determined by the industrial accident board."

NEVADA

(L. 1911, c. 183)

"§ 7. * * *¹ If a dispute then exists as to the workman's condition or amount of weekly compensation such dispute shall be determined by arbitration under this Act, or by judicial procedure as herein-after provided; *provided, also*, that any and all disputes arising under this Act may be first submitted to a board of arbitration, and in case of failure to settle it, resort may be had to courts of justice."

"§ 8. Arbitration proceedings shall be as follows: The employer and the workman may each choose one arbitrator, the two arbitrators thus chosen shall choose a third, and the three arbitrators shall hear

¹ For first part of this section see Chapter XXIII, *ante*, page 391. The first part of the section, however, applies to medical examinations as to the physical condition of the claimant.

New Hampshire

the facts of the dispute within three months after having been chosen, and within two weeks thereafter render a decision, which, if unanimous, shall be final and binding on both parties."

"§ 9. On failure of the board of arbitration to reach an adjustment of the dispute above referred to, either party may apply to a court of competent jurisdiction, and have an adjudication as in any other controversy. And the findings and judgment of the court shall be conclusive on all parties concerned. Said courts may compel the attendance of witnesses and the production of evidence, as in all other cases provided for by law, and the judgment of said court may continue and diminish or increase the weekly payments, subject to the maximum provided in this Act. The prevailing party in any action, brought under the provisions of this Act, shall be entitled to his costs of suit and reasonable attorney's fees; *provided*, that nothing in this Act shall operate to defeat the constitutional right of appeal."

NEW HAMPSHIRE

(L. 1911, c. 000)

"§ 9. Any question as to compensation which may arise under this act shall be determined by agreement or by an action at equity, as hereinafter provided. In case the employer fail to make compensation as herein provided, the injured workman, or his guardian if such be appointed, or his executor or administrator, may then bring an action to recover compensation under this act in any court having jurisdiction of an action for recovery of damages for negligence for the same injury between the same parties. Such action shall be by petition in equity, which may be made returnable at the appropriate term of

New Jersey

the Superior Court or may be filed in the office of the Clerk of the Superior Court and presented in term time or vacation to any justice of said court, who on reasonable notice shall hear the parties and render judgment thereon. The judgment in such action if in favor of the plaintiff shall be for a lump sum equal to the amount of payments then due and prospectively due under this act. In such action by an executor or administrator the judgment may provide the proportions of the award or the costs to be distributed to or between the several dependents. If such determination is not made it shall be determined by the Probate Court in which such executor or administrator is appointed, in accordance with this act, on petition of any party interested, on such notice as such court may direct. Any employer who has declared his intention to act under the compensation features of this act shall also have the right to apply by similar proceedings to the Superior Court or to any justice thereof for a determination of the amount of the weekly payments to be paid the injured workman, or of a lump sum to be paid the injured workman in lieu of such weekly payments; and either such employer or workman may apply to said Superior Court or to any justice thereof in similar proceedings for the determination of any other question that may arise under the compensation features of this act; and said court or justice, after reasonable notice and hearing, may make such order as to the matter in dispute and taxable costs as justice may require."

NEW JERSEY

(L. 1911, c. 95)

"§ II, 18. *In case of dispute question submitted to court.* In case of a dispute over, or failure to agree

New Jersey

upon, a claim for compensation between employer and employé, or the dependents of the employé, either party may submit the claim both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding."

"19. *Payment in case of death.* In case of death where no executor or administrator is qualified, the said judge shall, by order, direct payment to be made to such person as would be appointed administrator of the estate of such decedent upon like terms as to bond for the proper application of compensation payments as are required of administrators.

"20. *Procedure in dispute.* Procedure in case of dispute shall be as follows:

"*Petition to court.* Either party may present a petition to said judge setting forth the names and residences of the parties and the facts relating to employment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. This petition shall be verified by the oath or affirmation of the petitioner.

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"Notice of hearing. Answer filed. Upon the presentation of such petition the same shall be filed with the clerk of the court of common pleas, and the judge shall fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said petition. A copy of said petition shall be served as summons in a civil action and may be served within four days thereafter upon the adverse party. Within seven days after the service of such notice the adverse party shall file an answer to said petition, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for a petition.

"Hear witnesses. Determination. Subsequent proceedings. As to costs. At the time fixed for hearing or any adjournment thereof the said judge shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. This determination shall be filed in writing with the clerk of the common pleas court, and judgment shall be entered thereon in the same manner as in causes tried in the court of common pleas, and shall contain a statement of facts as determined by said judge. Subsequent proceedings thereon shall only be for the recovery of moneys thereby determined to be due, provided that nothing herein contained shall be construed as limiting the jurisdiction of the Supreme Court to review questions of law by certiorari. Costs may be awarded by said judge in his discretion, and when so awarded the same costs shall be allowed, taxed and collected as are allowed, taxed and collected for like services in the common pleas court."

New Jersey

"Chapter No. 241—Laws of 1911

"AN ACT

"Creating the employers' liability commission and prescribing its powers and duties, and requiring reports to be made by the employers of labor upon the operations of the employers' liability law for the information of said commission.

"Be it enacted by the Senate and General Assembly of the State of New Jersey:

"1. The Governor is hereby authorized to appoint six citizens of this State as an employers' liability commission, who shall hold their offices for the term of two years and until their successors are appointed and qualified. They shall receive no compensation for their services, but their actual traveling expenses incurred upon the business of the commission shall be paid by the State Treasurer, upon warrants approved by the president of the said commission. The commission shall have power to choose one of their number as president and one of their number as secretary, and shall have power to appoint a clerk. The expenses of the commission, the salary of the secretary and of the clerk shall be paid from appropriations made for that purpose in any annual or supplemental appropriation bill. It shall be the duty of the commission to observe in detail, so far as possible, the operations throughout the State of the recent act of the Legislature commonly known as 'The Employers' Liability Act,' entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability

Ohio

and compensation thereunder,' approved April fourth, one thousand nine hundred and eleven.

* * * * *

"3. This act shall take effect immediately.

"Approved by the Governor, April 27, 1911."

OHIO

(L. 1911, c. 000)

"§ 1. *Creating Board of Awards.* There is hereby created a State Liability Board of Awards, to be composed of three members, not more than two of whom shall belong to the same political party, to be appointed by the governor, within thirty days after the passage of this act, one of which members shall be appointed for the term of two years, one member for four years and one member for six years, and thereafter as their terms expire the governor shall appoint one member for the term of six years. Vacancies shall be filled by appointment by the governor for the unexpired term.

"§ 2. *Duties.* Each member of the Board shall devote his entire time to the duties of his office and shall not hold any position of trust or profit or engage in any occupation or business interfering or inconsistent with his duty as such member, or serve on or under any committee of any political party.

"§ 3. *Salary.* Each member of the Board shall receive an annual salary of five thousand dollars, payable in the same manner as salaries of state officers are paid.

"§ 4. *Sessions.* The Board shall be in continuous session and open for the transaction of business during all the business hours of each and every day, excepting Sundays and legal holidays. All sessions shall be open

Ohio

to the public, and shall stand and be adjourned without further notice thereof on its records. All proceedings of the Board shall be shown on its record of proceedings, which shall be a public record, and shall contain a record of each case considered, and the award made with respect thereto, and all voting shall be had by the calling of each member's name by the secretary and each vote shall be recorded as cast.

"§ 5. *Quorum.* A majority of the board shall constitute a quorum for the transaction of business, and a vacancy shall not impair the right of the remaining members to exercise all the powers of the full Board so long as a majority remains. Any investigations, inquiry or hearing which the Board is authorized to hold, or undertake, may be held or undertaken by or before any one member of the Board. All investigations, inquiries, hearings, and decisions of the Board, and every order made by a member thereof, when approved and confirmed by a majority of the members, and so shown on its record of proceedings, shall be deemed to be the order of the Board.

"§ 6. *Office.* The Board shall keep and maintain its office in the city of Columbus, and shall provide a suitable room or rooms, necessary office furniture, supplies, books, periodicals and maps. All necessary expenses shall be audited and paid out of the state treasury. The Board may hold sessions at any place within the State.

"§ 7. *Employés.* The Board may employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compensation. Such employments and compensation shall be first approved by the governor, and shall be paid out of the state treasury. The members of the Board, actuaries, accountants, inspectors, ex-

Ohio

aminers, experts, clerks, stenographers and other assistants that may be employed shall be entitled to receive from the state treasury their actual and necessary expenses while traveling in the business of the Board. Such expenses shall be itemized and sworn to by the person who incurred the expense, and allowed by the Board.

"§ 8. *Rules.* The Board shall adopt reasonable and proper rules to govern its procedure, regulate and provide for the kind and character of notices, and the services thereof, in cases of accident and injury to employes, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund, hereinafter provided for, the forms of application of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudications and awards shall be made.

Sections 9 and 10 relate to the furnishing of information by employers and the supplying of blanks for this purpose by the Board of Awards. See Chapter XXIX, *post*, page 542.

"§ 11. *Powers.* Each member of the Board, the secretary and every inspector or examiner appointed by the Board shall, for the purposes contemplated by this act, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.

"§ 12. *Disobedience of orders.* In case of disobe-

Ohio

dience of any person to comply with the order of the Board, or subpoena issued by it as one of its inspectors, or examiners, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, or refuse to permit an inspection as aforesaid, the probate judge of the county in which the person resides, on application of any member of the Board, or any inspector or examiner appointed by it, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of subpoena issued from such court on a refusal to testify therein.

"§ 13. *Fees.* Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the Board or an inspector or examiner, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of common pleas, which shall be audited and paid from the state treasury in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers approved by any two members of the Board. No witness subpoenaed at the instance of a party other than the board or an inspector shall be entitled to compensation from the state treasury unless the Board shall certify that his testimony was material to the matter investigated.

"§ 14. *Depositions.* In an investigation, the Board may cause depositions of witnesses residing within or without the State to be taken in the manner prescribed by the law for like depositions in civil actions in the court of common pleas.

"§ 15. *Evidence.* A transcribed copy of the evidence and proceedings, or any specific part thereof, of any investigation, by a stenographer appointed by

the Board, being certified by such stenographer to be a true and correct transcript of the testimony on the investigation, or of a particular witness, or of a specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and subscribed, may be received in evidence by the Board with the same effect as if such stenographer were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand to any party upon the payment of the fee therefor, as provided for transcript in courts of common pleas.

"§ 16. *Forms and rules.* The Board shall prepare and furnish blank forms, and provide in its rules for their distribution so that the same may be readily available, of application for benefits or compensation from the state insurance fund, notices to employers, proofs of injury or death, of medical attendance, of employment and wage earnings, and such other blanks as may be deemed proper and advisable, and it shall be the duty of insured employers to constantly keep on hand a sufficient supply of such blanks."

* * * * *

"§ 21. The State Liability Board of Awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, that have been injured in the course of their employment, wheresoever such injury has occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued."

"§ 36. *Decisions of board.* The Board shall have full power and authority to hear and determine all

Ohio

questions within its jurisdiction, and its decision thereon shall be final.

“Provided, however, in case the final action of such Board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant’s right, then the claimant within thirty (30) days after the notice of the final action of such board may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the State Liability Board of Awards, and he shall be notified by the clerk forthwith of the filing of such appeal.

“Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such Board as defendant and further pleadings shall be had in said cause according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and, if they determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this act; and any final judgment so obtained shall be paid by the State Liability Board of Awards out of the state insurance fund in the same manner as such awards are paid by such board.

“The costs of such proceeding, including a reasonable attorney’s fee to the claimant’s attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the

Rhode Island

right to prosecute error as in the ordinary civil cases."

"§ 36-1. *Procedure of board.* Such Board shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in their judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

RHODE ISLAND

(L. 1912, c. 000)

"ARTICLE III

"PROCEDURE

"§ 1. *Agreement as to compensation.* If the employer and the employé reach an agreement in regard to compensation under this act, a memorandum of such agreement signed by the parties shall be filed in the office of the clerk of the superior court having jurisdiction of the matter as provided in section 16 of this Article. The clerk shall forthwith docket the same in a book kept for that purpose, and shall thereupon present said agreement to a justice of the superior court, and when approved by the justice the agreement shall be enforceable by said superior court by any suitable process, including executions against goods, chattels, and real estate, and including proceedings for contempt for willful failure or neglect to obey the provisions of said agreement. No appeal shall lie from the agreement thus approved unless upon allegation that such agreement had been procured by fraud or coercion. Such agreement shall be

Rhode Island

approved by the justice only when its terms conform to the provisions of this act.

“When death has resulted from the injury and the dependents of the deceased employé entitled to compensation are, or the apportionment thereof among them is, in dispute, such agreement may relate only to the amount of compensation.

“§ 2. *Failure to agree.* If the employer and employé fail to reach an agreement in regard to compensation under this act, either employer or employé, and when death has resulted from the injury and the dependents of the deceased employé entitled to compensation are, or the apportionment thereof among them is, in dispute, any person in interest may file in the office of the clerk of the superior court having jurisdiction of the matter as provided in section 16 of this Article, a petition in the nature of a petition in equity setting forth the names and residences of the parties, the facts relating to employment at the time of the injury, the cause, extent and character of the injury, the amount of wages, earnings, or salary received at the time of the injury, and the knowledge of the employer or notice of the occurrence of the injury, and such other facts as may be necessary and proper for the information of the court, and shall state the matter in dispute and the claims of the petitioner with reference thereto.

“§ 3. *Copy of petition.* Within four days after the filing of the petition, a copy thereof, attested by the petitioner or his attorney, shall be served upon the respondent in the same manner as a writ of summons in a civil action.

“§ 4. *Answer to petition.* Within ten days after the filing of the petition, the respondent shall file an answer to said petition, together with a copy thereof

for the use of the petitioner, which shall state the claims of the respondent with reference to the matter in dispute as disclosed by the petition. No pleadings other than petition and answer shall be required to bring the cause to a hearing for final determination. The superior court may grant further time for filing the answer and allow amendments of said petition and answer at any stage of the proceedings. If the respondent do not file an answer, the cause shall proceed without formal default or decree pro confesso. If the respondent be an infant or person under disability, the superior court shall appoint a guardian ad litem for such infant or person under disability. Such guardian ad litem may be appointed on any court day after service of the copy referred to in section 3 of this Article, upon motion of any party after notice given as required for motions made in the superior court, and opportunity to said infant or person under disability to be heard in regard to the choice of such guardian ad litem. The guardian ad litem so appointed shall file the answer required by this section.

"§ 5. *Assignment for hearing.* The petition shall be in order for assignment for hearing on the motion day which occurs next after fifteen days from the filing of the petition. Upon the days upon which said petition shall be in order for hearing it shall take precedence of other cases upon the calendar, except cases for tenements let or held at will or by sufferance.

"§ 6. *Hearing.* The justice to whom said petition shall be referred by the court shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. His decision shall be filed in writing with the clerk, and a decree shall be entered thereon. Such decree shall be enforceable by said superior court by any suitable

Rhode Island

process, including executions against goods, chattels, and real estate, and including proceedings for contempt for willful failure or neglect to obey the provisions of said decree. Such decree shall contain findings of fact, which, in the absence of fraud, shall be conclusive. The superior court may award as costs the actual expenditures, or such part thereof as to the court shall seem meet, but not including counsel fees, and shall include such costs in its decree. The superior court may refuse to award costs, and no costs shall be awarded against an infant or person under disability or against a guardian ad litem."

"Art. III, § 15. *Procedure.* The superior court shall prescribe forms and make suitable orders as to procedure adapted to secure a speedy, efficient and inexpensive disposition of all proceedings under this act; and in making such orders said court shall not be bound by the provisions of the General Laws relating to practice. In the absence of such orders, special orders shall be made in each case.

"§ 16. *Actions where brought.* Proceedings shall be brought either in the county where the accident occurred or in the county where the employer or employé lives or has a usual place of business. The court where any proceeding is brought shall have power to grant a change of venue.

"§ 17. *Actions not to abate.* No proceedings under this act shall abate because of the death of the petitioner, but may be prosecuted by his legal representative or by any person entitled to compensation by reason of said death, under the provisions of this act."

"Art. III, § 19. *Monthly payments.* If an employé receiving a weekly payment under this act shall cease to reside in the state, or, if his residence at the time

Washington

of the accident is in an adjoining state, the superior court, upon the application of either party, may, in its discretion, having regard to the welfare of the employé and the convenience of the employer, order such payment to be made monthly or quarterly instead of weekly.

“§ 20. *Court settles questions.* All questions arising under this act, if not settled by agreement of the parties interested therein, shall, except as otherwise herein provided, be determined by the superior court.”

WASHINGTON

(L. 1911, c. 74)

“§ 21. *Creation of department.* The administration of this act is imposed upon a department, to be known as the Industrial Insurance Department, to consist of three commissioners to be appointed by the governor. One of them shall hold office for the first two years, another for the first four years, and another for the first six years following the passage and approval of this act. Thereafter the term shall be six years. Each commissioner shall hold until his successor shall be appointed and shall have qualified. A decision of any question arising under this act concurred in by two of the commissioners shall be the decision of the department. The governor may at any time remove any commissioner from office in his discretion, but within ten days following any such removal the governor shall file in the office of the secretary of state a statement of his reasons therefor. The commission shall select one of their members as chairman. The main office of the commission shall be at the state capitol, but branch offices may be established at other places in the State. Each member

Washington

of the commission shall have power to issue subpoenas requiring the attendance of witnesses and the production of books and documents.

"§ 22. *Salary of Commissioners.* The salary of each of the commissioners shall be thirty-six hundred dollars per annum, and he shall be allowed his actual and necessary traveling and incidental expenses; and any assistant to the commissioners shall be paid for each full day's service rendered by him, his actual and necessary traveling expenses and such compensation as the commission may deem proper, not to exceed six dollars per day to an auditor, or five dollars per day to any other assistant.

"§ 23. *Deputies and Assistants.* The commissioners may appoint a sufficient number of auditors and assistants to aid them in the administration of this act, at an expense not to exceed \$5,000.00 per month. They may employ one or more physicians in each county for the purpose of official medical examinations, whose compensation shall be limited to five dollars for each examination and report therein. They may procure such record books as they may deem necessary for the record of the financial transactions and statistical data of the department, and the necessary documents, forms and blanks. They may establish and require all employers to install and maintain an uniform form of pay roll.

"§ 24. *Conduct, Management and Supervision of Department.* The commission shall, in accordance with the provisions of this act:

"1. Establish and promulgate rules governing the administration of this Act.

"2. Ascertain and establish the amounts to be paid into and out of the accident fund.

"3. Regulate the proof of accident and extent

thereof, the proof of death and the proof of relationship and the extent of dependency.

"4. Supervise the medical, surgical and hospital treatment to the intent that same may be in all cases suitable and wholesome.

"5. Issue proper receipts for moneys received, and certificates for benefits accrued and accruing.

"6. Investigate the cause of all serious injuries and report to the governor from time to time any violations or laxity in performance of protective statutes or regulations coming under the observation of the department.

"7. Compile and preserve statistics showing the number of accidents occurring in the establishment or works of each employer, the liabilities and expenditures of the accident fund on account of, and the premium collected from the same, and hospital charges and expenses.

"8. Make annual reports to the governor (one of them not more than sixty nor less than thirty days prior to each regular session of the legislature) of the workings of the department, and showing the financial status and the outstanding obligations of the accident fund, and the statistics aforesaid."

"§ 26. *Disbursement of Funds.* Disbursement out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and audited by him. The state treasurer shall pay every warrant out of the fund upon which it is drawn. If, at any time, there shall not be sufficient money in the fund on which any such warrant shall have been drawn wherewith to pay the same, the employer on account of whose workman it was that the warrant was drawn shall pay the same, and he shall be credited upon his

next following contribution to such fund the amount so paid with interest thereon at the legal rate from the date of such payment to the date such next following contribution became payable, and if the amount of the credit shall exceed the amount of the contribution, he shall have a warrant upon the same fund for the excess, and if any such warrant shall not be so paid, it shall remain, nevertheless, payable out of the fund. The state treasurer shall to such extent as shall appear to him to be advisable keep the moneys of the unsegregated portion of the accident fund invested at interest in the class of securities provided by law for the investment of the permanent school fund. The state treasurer shall be liable on his official bond for the safe custody of the moneys and securities of the accident fund, but all the provisions of an act approved February 21, 1907, entitled "An act to provide for state depositories and to regulate the deposits of state moneys therein," shall be applied to said moneys and the handling thereof by the state treasurer.

"§ 27. *Test of Invalidity of Act.*¹ If any employer shall be adjudicated to be outside the lawful scope of this Act, the Act shall not apply to him or his workman, or if any workman shall be adjudicated to be outside the lawful scope of this Act because of remoteness of his work from the hazard of his employer's work, any such adjudication shall not impair the validity of this Act in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of section 4 of this Act for the creation of the accident fund, or the provisions of this Act

¹ See § 28, in Chapter XXII, for effect on Statute of Limitations of adjudication of invalidity of Act. *Ante*, page 381.

Wisconsin

making the compensation to the workman provided in it exclusive of any other remedy on the part of the workman shall be held invalid the entire Act shall be thereby invalidated except the provisions of section 31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this Act shall not affect the validity of the Act as a whole or any other part thereof."

WISCONSIN

(L. 1911, c. 50)

"§ 2394-13. There is hereby created a board which shall be known as the industrial accident board. The commissioner of labor and industrial statistics shall be ex-officio a member of such board. He may however, authorize the deputy commissioner to act, in his place. Within thirty days after the passage of this Act, the governor, by and with the advice and consent of the senate, shall appoint a member who shall serve two years, and another who shall serve four years. Thereafter such two members shall be appointed and confirmed for terms of four years each. Vacancies shall be filled in the same manner for the unexpired term. Each member of the board, before entering upon the duties of his office, shall take the oath prescribed by the constitution. A majority of the board shall constitute a quorum for the exercise of any of the powers or authority conferred by this Act, and an award by a majority shall be valid. In case of a vacancy, the remaining two members of the board shall exercise all the powers and authority of the board until such vacancy is filled. Each member of the board, including the said

Wisconsin

commissioner, shall receive an annual salary of \$5,000. This salary shall, as to the commissioner of labor and industrial statistics, be in full for his services as such commissioner of labor and industrial statistics."

"§ 2394-14. The board shall organize by choosing one of its members as chairman. Subject to the provisions of this Act, it may adopt its own rules of procedure and may change the same from time to time in its discretion. The board, when it shall deem it necessary to expedite its business, may from time to time employ one or more expert examiners for such length of time as may be required, such examiners to be exempt from the operation of chapter 363 of the laws of 1905, and amendatory acts. It may also appoint a secretary, who shall be similarly exempt, and such clerical help as it may deem necessary. It shall fix the compensation of all assistants so appointed. It shall provide itself with a seal for the authentication of its orders, awards, and proceedings, upon which shall be inscribed the words "Industrial Accident Board—Wisconsin—Seal." It shall keep its office at the capitol, and shall be provided by the superintendent of public property with a suitable room or rooms, necessary office furniture, stationery and other supplies. The members of the board and its assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board; but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board, before payment is made. All salaries and expenses authorized by this Act shall be audited and paid out of the general funds of the state, the same as other general state expenses are audited and paid.

"§ 2394-15. Any dispute or controversy concerning compensation under this Act, including any in which the state may be a party, shall be submitted to said industrial accident board in the manner and with the effect provided in this Act. Every compromise of any claim for compensation under this Act shall be subject to be reviewed by, and set aside, modified, or confirmed by the board upon application made within one year from the time of such compromise."

"§ 2394-16. Upon the filing with the board by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, it shall fix a time for the hearing thereof, which shall not be more than forty days after the filing of such application. The board shall cause notice of such hearing, embracing a general statement of such claim, to be given to each party interested, by service of such notice on him personally or by mailing a copy thereof to him at his last known post-office address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the board, and hearings may be held at such places as the board shall designate. Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the board; but the board may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and pay roll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time direct any employé claiming

Wisconsin

compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing. The board, or any member thereof, or any examiner appointed thereby, shall have power and authority to issue subpoenas, to compel the attendance of witnesses or parties, and the production of books, papers, or records, and to administer oaths. Obedience to such subpoenas shall be enforced by the circuit court of any county."

"§ 2394-17. After final hearing by said board, it shall make and file (1) its findings upon all the facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties. Pending the hearing and determination of any controversy before it, the board shall have power to order the payment of such, or any part of the compensation, which is or may fall due, as to which the party from whom the same is claimed does not deny liability in good faith within ten days after the giving of notice of hearing provided for in the preceding section; and if the same shall not be paid as required by such order, the facts with respect to the liability therefor, and the determination of the board, as to the rights of the parties, shall be embraced in, and constitute a part of, its finding and award; and the board shall have the power to include in its award, as a penalty for non-compliance with any such order, not exceeding twenty-five per cent of each amount which shall not have been paid as directed thereby.

"§ 2394-18. Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render a

Wisconsin

judgment in accordance therewith; which judgment, until and unless set aside as hereinafter provided, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed."

CHAPTER XXV

REVIEWING AWARDS BY APPEAL

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1. Introduction.

The question of the right to appeal depends almost entirely on statutes under modern procedure. Some general principles not covered by particular statutes are now and then decided by the courts. The decisions which follow have been selected from the British reports as applicable to some phases of the compensation laws of the American States.

2. Points raised below only considered on appeal.

An appeal by an employer cannot be entertained on

Reviewing facts

points which were not taken in the court below. *Payne and Another v. Clifton* (1910), 3 B. W. C. C. 439.

3. Reviewing facts.

Where the facts are either found or admitted, the only question to be decided is the inference to be drawn from those facts, which is a question of law; and it is open to the Court of Appeal in such a case to review the conclusion at which the learned County Court judge arrived, and to say whether it is or is not wrong in point of law, and whether or not he has misdirected himself. *Gane v. Norton Hill Colliery Co.* (1909), 100 L. T. 979; 2 B. W. C. C. 42.

An appeal to the Court of Appeal in England must be dismissed when it is on purely a question of fact. *Rayman v. Fields*, No. 2 (1910), 102 L. T. R. 154; 3 B. W. C. C. 123.

A workman was injured and was paid compensation for twenty-one weeks. The employers then stopped payment and disputed liability of any kind, including even the occurrence of an accident. Arbitration proceedings were brought by the workman and terminated in favor of the employer. Subsequently the workman applied to the County Court judge to have the implied agreement recorded. The judge refused on the ground that he had already found, as a fact, no personal injury had occurred arising out of or in the course of the workman's employment on the date alleged, and that the payments which had already been made were in the nature of a compassionate allowance, and that there was no agreement. On appeal to the Court of Appeal it was held that these were findings of fact, with which the appellate court could

Order terminating weekly payments not appealed from is final

not interfere. *Turner v. G. Bell and Sons* (1910), 4 B. W. C. C. 63.

A workman with an injured hand was advised by his own doctor that he could not recover the use of it, but the employers' doctor advised that he ought to exercise it, and that he would soon recover if he did so. He did not exercise it, and the employers applied for a review of the weekly payments on the ground that the incapacity was due not to the injury but to the unreasonable conduct of the man in not exercising the hand. The County Court judge held that the man had not behaved unreasonably and dismissed the application to review. It was held on appeal that the question was one of fact, and there was evidence to support the decision. *Moss & Co. v. Akers* (1911), 4 B. W. C. C. 294.

4. Determining adequacy of lump sum paid under agreement.

An agreement for the redemption of a weekly payment by a lump sum was sent to a registrar to record. It appearing inadequate, the registrar under the powers given him by Schedule II (9) (d), referred it to the judge. The judge, holding that the sole question for him to decide was whether the agreement had in fact been made, declined to decide the question of adequacy. It was held on appeal that the case must go back for the question of adequacy to be decided. *Owners of the Steamship "Segura" v. Blampied* (1911), 4 B. W. C. C. 192.

5. Order terminating weekly payments not appealed from is final.

An order terminating weekly payments is, unless

California

appealed from, final, and the original agreement or order is not then the subject of review. *Nicholson v. Piper* (1906), 96 L. T. 75; 9 W. C. C. 123, aff'd, House of Lords (1907), A. C. 215; 97 L. T. 119; 9 W. C. C. 128.

6. Dismissal of action and making decision in arbitration proceedings.

Where in an action under the Employers' Liability Act the judge dismissed the action and then came to the conclusion that no compensation was payable under the Workmen's Compensation Act, it was held that an appeal could be taken from his action as a judge and that he did not deal with the case as an arbitrator under the Employers' Liability Act. *Granick v. British Columbia Sugar Co.* (1910), 15 B. C. R. 452; 4 B. W. C. C. 452.

7. Award of costs.

If a judge grants a party costs they must be taxed, and when an order as to costs is made part of an award, an appeal lies to the Court of Appeal in respect to such order. *Beadle and Others v. Owners of S. S. "Nicholas"* (1909), 101 L. T. 586; 3 B. W. C. C. 102.

CALIFORNIA

(L. 1911, c. 399)

"§ 18. The findings of fact made by the board acting within its powers, shall, in the absence of fraud, be conclusive, and the award, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: within thirty days from the date of the award, any

California

party aggrieved thereby may file with the board an application in writing for a review of such award, stating generally the grounds upon which such review is sought; within thirty days thereafter the board shall cause all documents and papers on file in the matter, and a transcript of all testimony which may have been taken therein, to be transmitted with their findings and award to the clerk of the superior court of that county or city and county wherein the accident occurred; such application for a review may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other, subject, however, to the provisions of law, for a change of the place of trial or the calling of another judge. Upon such hearing the court may confirm or set aside such award, and any judgment which may theretofore have been rendered thereon, but the same shall be set aside only upon the following grounds:

"(1) That the board acted without or in excess of its powers.

"(2) That the award was procured by fraud.

"(3) That the findings of fact by the board do not support the award.

"§ 19. Upon the setting aside of any award the court may recommit the controversy and remand the record in the case to the board, for further hearing or proceedings, or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such award, and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties, or city and county.

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Massachusetts

"§ 20. Any party aggrieved by a judgment entered upon the review of any award, may appeal therefrom within the time and in the manner provided for an appeal from the orders of the superior court; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as criminal causes on such calendar."

ILLINOIS

(L. 1911, c. 000)

Appeals may be taken to the Circuit Court from decisions of arbitrators. § 10. See Chapter XXIV, *ante*, page 411.

KANSAS

(L. 1911, c. 218)

There does not seem to be any provision in the Act for an appeal from an award by arbitrators but the ordinary appeals may be taken from judgments entered after a trial in court.

See §§ 29 and 32, in Chapter XXVI, *post*, pages 487-488 for provision as to modification of agreement or award.

MASSACHUSETTS

(L. 1911, c. 751)

After a decision by arbitrators either party may appeal within seven days (Part III, § 7) to the Industrial Accident Board.

Part III, §§ 10 and 11 provide:

"§ 10. If a claim for a review is filed, as provided in Part III, section seven, the board shall hear the

Massachusetts

parties and may hear evidence in regard to any or all matters pertinent thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter of right be entitled to a second hearing on any question of fact.

"§ 11. Any party in interest may present certified copies of an order or decision of the board, a decision of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the board, and all papers in connection therewith, to the superior court for the county in which the injury occurred or for the county of Suffolk, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though duly rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact, or where the decree is based upon a decision of an arbitration committee or a memorandum of agreement, and that there shall be no appeal from a decree based upon an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board. Upon the presentation to it of a certified copy of a decision of the industrial accident board ending, diminishing or increasing a weekly payment under the provisions of Part III, section twelve, the court shall revoke or modify the decree to conform to such decision." (As amended by L. 1912, c. 571.)

MICHIGAN

(L. 1912, c. 000)

“Part III, § 11. If a claim for review is filed, as provided in part three, section eight, the industrial accident board shall promptly review the decision of the committee of arbitration and such records as may have been kept of its hearings, and shall also if desired hear the parties, together with such additional evidence as they may wish to submit, and file its decision therein with the records of such proceedings. Such review and hearing may be held in its office at Lansing or elsewhere as the board shall deem advisable.

“§ 12. The findings of fact made by said industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but the supreme court shall have power to review questions of law involved in any final decision or determination of said industrial accident board: Provided, That application is made by the aggrieved party within thirty days after such determination by certiorari, mandamus or by any other method permissible under the rules and practice of said court or the laws of this state, and to make such further orders in respect thereto as justice may require.

“§ 13. Either party may present a certified copy of the decision of such industrial accident board approving agreements of settlement as provided in part three, section five hereof, or of the decision of such committee of arbitration when no claim for review is made as provided in part three, section eight, or of the decision of such industrial accident board when a claim for review is filed as provided in part three,

New Hampshire

section eleven, providing for payment of compensation under this act, to the circuit court for the county in which such accident occurred, whereupon said court shall, without notice, render a judgment in accordance therewith against said employer and also against any insurance company carrying such risk under the provisions of this act; which judgment, until and unless set aside shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed."

NEVADA

(L. 1911, c. 183)

Compensation is enforced in Nevada by an action in court. Either party can appeal the same as in any other action. § 9. See Chapter XXIV, *ante*, page 427.

NEW HAMPSHIRE

(L. 1911, c. 000)

The decision of the Commissioner of Labor as to the financial ability of any employer to comply with the act, and as to requiring such employer to give a bond may be reviewed by any justice of the Superior Court upon petition. See § 3 in Chapter II, *ante*, page 155.

Disputes arising under the Act are determined by the court. See § 9, in Chapter XXIV, *ante*, page 427. Such determinations may be reviewed in the same manner as other decisions by the courts. Otherwise there is no special provision in the act relative to reviewing determinations under the statute.

NEW JERSEY

(L. 1911, c. 95)

Paragraph 18, of § 2, (Chapter XXIV, *ante*, page 428) provides that in case of dispute the determination of the judge of the Court of Common Pleas, "shall be conclusive and binding." Paragraph 20 of the same section (Chapter XXIV, *ante*, page 429) provides, however, "that nothing herein contained shall be construed as limiting the jurisdiction of the Supreme Court to review questions of law by certiorari." It appears therefore that the only method of review under the New Jersey Act is by certiorari to the Supreme Court.

OHIO

(L. 1911, c. 000)

"§ 36. *Decisions of Board.* The Board shall have full power and authority to hear and determine all questions within its jurisdiction, and its *decision* thereon shall be final.

"Provided, however, in case the final action of such Board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such Board may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the pros-

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ecuting attorney of the county, without additional compensation, shall represent the State Liability Board of Awards, and he shall be notified by the clerk forthwith of the filing of such appeal.

“Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant and further pleadings shall be had in said cause according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and, if they determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this act; and any final judgment so obtained shall be paid by the State Liability Board of Awards out of the state insurance fund in the same manner as such awards are paid by such board.

“The costs of such proceeding including a reasonable attorney’s fee to the claimant’s attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the right to prosecute error as in the ordinary civil cases.”

RHODE ISLAND

(L. 1912, c. 000)

“Art. III, § 7. *Appeal.* Any person aggrieved by the final decree of the superior court under this act may appeal to the supreme court upon any question of law or equity decided adversely to the appellant by said final decree or by any proceeding or ruling prior thereto appearing of record, the appellant having first had his objections noted to any adverse rulings made during the progress of the trial at the time such rulings were made, if made in open court and not otherwise of record.

The appellant shall take the following steps:

“(a) Within ten days after entry of said final decree he shall file a claim of appeal and, if a transcript of the testimony and rulings or any part thereof be desired, a written request therefor.

“(b) Within such time as the justice of the superior court who heard the petition, or, in case of his inability to act from any cause within such time as any other justice thereof shall fix, whether by original fixing of the time, or by extension thereof, or by a new fixing after any expiration thereof, the appellant shall file reasons of appeal stating specifically all the questions of law or equity decided adversely to him which he desires to include in his reasons of appeal, together with a transcript of as much of the testimony and rulings as may be required. The supreme court may allow amendments of said reasons of appeal. Upon the filing of said reasons of appeal and transcript, the clerk of the superior court shall present the transcript to the justice who heard the cause for allowance. The justice after hearing and examination, shall restore the transcript to the files of the clerk with a certificate of his action thereon made within twenty days after filing the transcript, unless the twentieth day shall fall in vacation, in which event the certificate may be filed at any time before the first Monday in the following month of October.

“If the transcript be not allowed by the justice who heard the cause within the time prescribed, or objection to his allowance be made by any party, the correctness of the transcript may be determined by the supreme court by petition filed within thirty days after filing the transcript, unless the thirtieth day shall fall in vacation, in which event the correctness of the transcript may be determined by petition filed

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on or before the tenth day after the first Monday in the following month of October. In all other respects than in time of filing the same course shall be followed as provided in section 21 of Chapter 298 of the General Laws for establishing the truth of exceptions.

“§ 8. *Certifying papers.* Upon the restoration of the transcript to the files, or, if there be no transcript, then upon the filing of the reasons of appeal, the clerk of the superior court shall certify the cause and all papers to the supreme court.

“§ 9. *Appeal suspends decree.* The claim of an appeal shall suspend the operation of the decree appealed from, but, in case of default in taking the procedure required, such suspension shall cease, and the superior court upon motion of any party shall proceed as if no claim of appeal had been made, unless it be made to appear to the superior court that the default no longer exists.

“§ 10. *Motion day.* Any court day in the supreme court shall be a motion day for the purpose of hearing a motion to assign the appeal for hearing.

“§ 11. *Decision.* The supreme court after hearing any appeal shall determine the same, and affirm, reverse or modify the decree appealed from, and may itself take, or cause to be taken by the superior court, such further proceedings as shall seem just. If a new decree shall be necessary, it shall be framed by the supreme court for entry by the superior court. Thereupon the cause shall be remanded to the superior court for such further proceedings as shall be required.

“§ 12. *Execution.* No process for the execution of a final decree of the superior court from which an appeal may be taken shall issue until the expiration of ten days after the entry thereof, unless all parties against whom such decree is made waive an appeal

Washington

by a writing filed with the clerk or by causing an entry thereof to be made on the docket.

"13. *Questions of law.* If, in the course of the proceedings in any cause, any question of law shall arise which in the opinion of the superior court is of such doubt and importance, and so affects the merits of the controversy, that it ought to be determined by the supreme court before further proceedings, the superior court may certify such question to the supreme court for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties."

WASHINGTON

(L. 1911, c. 74)

"§ 20. *Court Review.* Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence (except as otherwise provided in subdivision (1) of section numbered 5) in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within twenty days following the rendition of the decision appealed from and communication

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thereof to the person affected thereby. No bond shall be required, except that an appeal by the employer from a decision of the department under section 9 shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay. The calling of a jury shall rest in the discretion of the court except that in cases arising under sections 9, 15 and 16 either party shall be entitled to a jury trial upon demand. It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case, and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal advisor of the department and shall represent it in all proceedings, whenever so requested by any of the commissioners. In all court proceedings under or pursuant to this act the decision of the department shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same."

"§ 25. *Medical Witnesses.* Upon the appeal of any workman from any decision of the department affecting the extent of his injuries or the progress of the same, the court may appoint not to exceed three physicians to examine the physical condition of the appellant, who shall make to the court their report thereon, and they may be interrogated before the

Wisconsin

court by or on behalf of the appellant in relation to the same. The fee of each shall be fixed by the court, but shall not exceed ten dollars per day each."

WISCONSIN

(L. 1911, c. 50)

"§ 2394-19. The findings of fact made by the board acting within its powers shall, in the absence of fraud, be conclusive; and the award, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within twenty days from the date of the award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the board for the review of such award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the board, or any member of the board, shall be deemed completed service. The board shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the board shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its findings and award. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such award; and any judgment which may theretofore have been

Wisconsin

rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the board acted without or in excess of its powers.
2. That the award was procured by fraud.
3. That the findings of fact by the board do not support the award.

"§ 2394-20. Upon the setting aside of any award the court may recommit the controversy and remand the record in the case to the board, for further hearing or proceedings; or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such award, and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties."

"§ 2394-21. Said board, or any party aggrieved by a judgment entered upon the review of any award, may appeal therefrom within the time and in the manner provided for an appeal from the orders of the circuit court; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as state causes on such calendar."

CHAPTER XXVI

MODIFYING AWARDS OTHERWISE THAN BY APPEAL

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1. Circumstances must have changed to justify review.

Weekly payments can only be reviewed if the circumstances have altered since the last award was made; otherwise the review would amount to a rehearing of the arbitration, which is not permissible. *Crossfield & Sons v. Tanian*, 82 L. T. 813; 2 W. C. C. 141.

2. Res adjudicata.

On an application to review the employer is entitled to introduce evidence as to the physical condition of the employ  , even though it conflicts with the former finding as to such physical condition on the date of the finding, as the determination of the County Court judge, as to the physical condition of the workman, is not *res adjudicata*. *Mead v. Lockhart* (1909), 2 B. W. C. C. 398.

Where a workman received compensation for a while and then the amount was reduced and he subsequently applied for an increase, on the ground that although his finger which was injured was in the same condition

Res adjudicata

as at the date of the last review, the fact that he had made several applications for work which had been refused on account of his condition, showed that his earning capacity was in fact reduced as a result of the accident. It was held that the last review, by which the compensation was reduced, was not *res adjudicata*, as against the workman, and that an order of the County Court judge, increasing the compensation, should be sustained. *Radcliffe v. The Pacific Steam Navigation Co.* (1910), 102 L. T. 206; 3 B. W. C. C. 185. In the last-mentioned case it was held that certain matters became *res adjudicata* on such a review; for example, the fact that the workman was an employé; that he was injured in the course of his employment; but that the same doctrine did not apply to the amount of compensation, because the statute made this subject to review by subsequent proceedings.

A collier lost the sight of one eye by accident and compensation was paid for two and a half years under an agreement. Another agreement reducing the amount of compensation was then entered into in March, 1908. In January, 1909, the employers applied to further reduce the compensation. The workman contended that the amount of his incapacity had been settled once and for all by the agreement of March, 1908. It was held that the man was fit for his work as a miner, and the judge reduced the compensation to one penny a week. It was held on appeal that the evidence before the County Court judge was sufficient to sustain the decision, and that the workman's contention that the agreement of March, 1908, was *res adjudicata* could not be sustained. *The Cawdor and Garnant Collieries v. Jones* (1909), 3 B. W. C. C. 59.

Terminating compensation payments

3. New medical evidence on review to show changed circumstances.

On review of an award medical evidence on new observations and tests is admissible to show a change of circumstances. *Sharman v. Holliday & Greenwood* (1903), 90 L. T. 46; 6 W. C. C. 147.

4. Terms of application for review binding on applicant.

On an application by employers to review a weekly payment the court is bound by the terms of the employer's application and has no jurisdiction to find that the workman has recovered from the accident at a time previous to that suggested in the application. *Upper Forest and Western Steel and Tinplate Co. v. Thomas* (1909), 2 B. W. C. C. 414.

5. Modifying award from a date earlier than the date of the application to modify.

On an application to review a weekly payment the arbitrator may vary the weekly payments from the date of the application, but not from an earlier date. *Donaldson Brothers v. Cowan* (1909), 46 Scotch L. R. 920; 2 B. W. C. C. 390.

On an application to review compensation it is not competent for the County Court judge to go outside of that application and to make an order terminating liability from an antecedent date. *Charing Cross, Euston and Hampstead Ry. Co. v. Boots* (1909), 101 L. T. 53; 2 B. W. C. C. 385.

6. Terminating compensation payments.

A workman was injured, and liability was admitted,

Terminating compensation payments

and compensation agreed upon during incapacity. Subsequently notice was given by the employer of his intention to terminate the weekly payments, on the ground that the workman had recovered, and a joint application was made for a reference to a medical referee, in accordance with the statute. The referee certified that the man was fit for work. The workman then filed an application for arbitration, at the hearing of which the County Court judge, on the medical evidence, terminated the employer's liability. It was held that the judge had jurisdiction to make such an order, and was not bound to make a nominal award of compensation, containing a declaration of liability. *Cranfield v. Ansell* (1910), 4 B. W. C. C. 57.

By an accident a workman lost one finger and received permanent injury to two other fingers, and was awarded 4s. 7d. a week compensation. On an application to review the weekly payments, the County Court judge, on the evidence, made an order terminating the employers' liability. The workman requested that the weekly compensation be reduced to 1d. a week, to keep alive his right to apply for a further review in the event of future loss, but the Court of Appeal held that the question decided by the court below was one of fact with which the Court of Appeal could not interfere. *Emmerson v. Donkin and Co.* (1910), 4 B. W. C. C. 74.

Where a workman has returned to work and is receiving the same wages that he did before the accident from his old employer and the compensation payments have been reduced to a nominal amount, it was held, on an application to terminate the payment entirely, that the question is not whether the man's employers are paying him or should pay him at the time of the appli-

Question of recovery from injury is one of fact

cation the same wages as before the accident, but whether the man is left in such position that in the open market his earning capacity may in the future be less than it was before the accident as the result of the accident. *Birmingham Cabinet Manufacturing Co. v. Dudley* (1910), 102 L. T. 619; 3 B. W. C. C. 169.

7. Question of recovery from injury is one of fact.

The question of whether a workman has or has not recovered is one of fact, and the arbitrators' finding on this question will not be reviewed on appeal where there is no evidence to support it. *Cunningham v. M'Naughton & Sinclair* (1910), 47 Scotch L. R. 781; 3 B. W. C. C. 577.

A workman's hand was injured on December 2, 1907; his employers agreed to pay compensation and a memorandum of this agreement was recorded in May, 1908. After several operations for blood-poisoning his little finger was amputated. In January, 1910, an application was made by the employers to reduce the weekly payments; the grounds of the application were that the workman had wholly or partially recovered from the injury, and was then able to work and receive wages. The judge dismissed the application, holding that there was some incapacity still, and the Court of Appeal held that on the evidence the decision was correct. *Leeds & Liverpool Canal Co. v. Hesketh* (1910), 102 L. T. 663; 3 B. W. C. C. 301.

A workman injured one finger in July, 1909, and compensation was paid under a registered agreement. On November 26, 1909, the workman admitted to the employers' doctor that he was able to work, but on January 17, 1910, when the employers applied to

Refusal to submit to surgical operation

terminate the agreement, the tip of the finger was still slightly tender. The arbitrator terminated the compensation, and refused to make a suspensory award. It was held on appeal that the decision was on a question of fact, and there was evidence to support it; and that the case was not a proper one for a suspensory award. *Goodall and Clarke v. Kramer* (1910), 3 B. W. C. C. 315.

8. Increasing age as affecting disability.

An award of compensation which has been paid some time should not be reduced on the ground that by reason of the increased age of the workman he would not be earning as much as he was getting at the time of the accident even if he had not been injured. *Smith v. Hughes* (1905), 8 W. C. C. 115.

9. Refusal to submit to surgical operation.

Where a workman has submitted to one operation as advised by the medical referee, which operation was unsuccessful, and he was then requested by his employers to submit to another operation, which he refused to do, it was held, on an application to review the compensation award that as no evidence tending to show that the second operation would be successful was tendered, there was no power to submit the case to the medical referee for a further hearing. *Carroll v. Gray and Sons* (1910), 47 Scotch L. R. 646; 3 B. W. C. C. 572.

A workman, after being for some time in receipt of compensation, refused to undergo an operation. On an application to review the doctors were unanimous as to the advisability and as to the strong possibility of the success of the suggested operation. The workman

Reducing payments by reason of ability to do light work

called two doctors whose opinions disagreed. It was held that the finding of the County Court judge that this workman was not unreasonable, was a fact which could not be upset on appeal. *Ruabon Coal Co. v. Thomas* (1909), 3 B. W. C. C. 32.

Where a workman had injured his finger in such a way as to make it stiff and crooked, and it was reported by the medical men that by amputating the finger the workman would be able to use the hand to better advantage, and the workman refused to undergo the operation, it was held that the employer who had been paying compensation could not merely stop the entire compensation on the ground of unreasonable refusal of the workman to undergo the operation, but his remedy was by a proceeding to review. *O'Neill v. Ropner & Co.*, 42 Irish L. T. 3; 2 B. W. C. C. 334.

Where a workman refused to undergo a simple and minor operation, by which it clearly appears he would be restored to capacity for work, and that the workman was of good sound constitution and general health it was held that the arbitrator was justified in discontinuing compensation. *Donnelly v. William Baird & Co.* (1908), 45 Scotch L. R. 394; 1 B. W. C. C. 95.

10. Reducing payments by reason of ability to do light work.

A workman was in receipt of weekly payments under an award. The employers applied for diminution of the payments, on the ground that the man was fit to do light work. There was no evidence that the man could get light work, and there was evidence that he had made numerous attempts to do so and had failed. The County Court judge found that the man was able to

Inability to obtain light work

do light work and reduced the payments from 9s. 2d. to 8s. per week. The Court of Appeal held that there was evidence on which the payments could be reduced. *Cardiff Corporation v. Hall* (1911), 104 L. T. 467; 4 B. W. C. C. 159. Compare the last-mentioned decision with the case of *Proctor & Sons v. Robinson* (1909), 3 B. W. C. C. 41, where it seems to have been held that the fact that the workman might be able to do some kind of light work was not sufficient ground on which to reduce the compensation.

11. Inability to obtain light work.

Where an agreement has been entered into to pay partial compensation, it is no ground for review, on behalf of the workman, to allege that he is totally incapacitated, upon the contention that his employers are unable to give him suitable light work and he is unable to obtain light employment elsewhere. *Boag v. Lochwood Collieries* (1909), 47 Scotch L. R. 47; 3 B. W. C. C. 549. In the last-mentioned case the court said: "As I read the Act of Parliament and relative schedule the question to be decided in an application to assess compensation or under an application for review of weekly payments is the question of the man's physical capacity to work. Now, in this case it had been decided by agreement that the workman was partially capable for work. Is it any reason for reviewing the payment to say that the employers cannot find him suitable work for his capacity, or that he has not been able to find such work himself? If the appellant means that his averments if proved would of themselves be a sufficient ground for saying that compensation must be increased to the full allowance under the statute, I

Reducing payments after offer and refusal of light work

should certainly not for myself yield for one moment to any such demand. I take it that the whole question is that of 'capacity to work,' which cannot be decided merely by the fact that the workman has not got work, but only by such evidence as satisfies the court whether or not he is able to work.'

12. Offering suitable employment.

A miner who had injured one eye so that he had practically no use thereof, was receiving compensation when his employers offered him work in the mine at the coal face. This he refused and it was held that this could not be called "suitable employment" within the meaning of § 3 of Schedule 1, for the reason that there was some appreciable increase of peril to the remaining eye, and that the consequences of injury to the remaining eye of a one-eyed man would be very serious, and that therefore the employers were not entitled to have the compensation discontinued, by reason of having offered the workman employment which he had refused. *Eyre v. Houghton Main Colliery Co.* (1910), 102 L. T. R. 385; 3 B. W. C. C. 250.

13. Reducing payments after offer and refusal of light work.

An injured workman in receipt of compensation was examined jointly by his own and the employer's doctors, who reported that he was fit for light work. His employer then offered him light work, but he refused, thinking that the work offered involved some heavy labor. The employer then applied for a review and the County Court judge, finding that the man was fit for light work, and that the offer made it perfectly clear

Failure of workman to get or attempt to get light work

that the man would not have to do any heavy labor, reduced the payments to 1*d.* a week. It was held on appeal that there was evidence to support the decision. *McNamara & Co. v. Burt* (1911), 4 B. W. C. C. 151.

A workman having been in receipt of full compensation for some months, entered into an agreement with his old employers, to do light work at his former rate of wages, and that in the event of total incapacity recurring his rights under the Act should revive. He again became totally incapacitated, and claimed compensation, which was paid. He was subsequently offered light employment at reduced wages, with half the difference between his former and present wages. This offer he refused, claiming that according to the terms of the agreement he was entitled to full wages. The employers maintained that the agreement terminated when the subsequent claim for compensation was made, and that the workman was relegated to his rights under the Act. The County Court judge upheld the contention of the employers and this determination was sustained by the Court of Appeal. *Branford v. North Eastern Railway Co.* (1910), 4 B. W. C. C. 84.

14. Failure of workman to get or attempt to get light work.

On an application by employers to review, it was proved that the workman was fit for light work, but no evidence was given that the man had been offered or could get light work. It was admitted that he had not attempted to get it. The County Court judge reduced the payments from 15*s.* to 10*s.* per week. It was held that there was no evidence on which the reduction

Permanent injury; increased disability from disease

could properly be made. *Anglo-Australian Steam Navigation Co. v. Richards* (1911), 4 B. W. C. C. 247.

15. Disability from disease following injury.

A workman was injured and received compensation. He soon returned to work at full wages and compensation ceased. Some time later he fell ill and attributing his illness to the injury, applied for compensation. The employers resisted on the ground that the workman had fully recovered from the effects of the accident when he returned to work. The County Court judge found that the man had recovered from the injury and that the illness had no connection with it and the compensation was therefore terminated. *London & North-Western Railway v. Taylor* (1910), 4 B. W. C. C. 11.

16. Workman permanently injured but suffering increased disability from disease.

A collier, in 1906, had his right hand permanently injured. He received full compensation at 12s. 1d. per week and was then given light work at which he earned more than his old wages. In 1910 he left his work as his heart was affected by disease, which prevented him from continuing this light work, and registered a memorandum of an agreement to pay full compensation. His employers at once applied for a review and reduction of the payments. The County Court judge found that the man was unfit for work, but that the heart disease was not connected with the injury to the hand, and awarded 10s. per week. It was held that as the workman was still suffering from an obvious permanent injury, due to the accident, he was entitled to compensation, the amount of which was a question

for the judge to determine. *Cory Brothers & Co. v. Hughes* (1911), 2 K. B. 738; 4 B. W. C. C. 291.

17. Rolling-mill hand able to work with glasses when vision impaired.

A workman in a steel rolling mill had the sight of one eye impaired by an accident. He received compensation for some time and the employers then applied to review the payments. Conflicting medical evidence being given as to the state of the man's vision, the judge referred the matter to a medical referee, who reported that the man would see better with glasses, and could do his old work, but did not make it clear that he could work without glasses. The judge found that the man was physically able to work, but that, as a man with glasses was unlikely to obtain employment in a steel rolling mill, he was not commercially able to earn, and dismissed the application to review. It was held that there was evidence of a change of circumstances, which the judge ought to have considered, and that the case must go back to him for a rehearing. *Guest, Keen & Nettlefolds v. Winsper* (1911), 4 B. W. C. C. 289

18. Disability due to idleness and softened muscles.

A collier was injured in 1907 and received compensation until 1910. His employers then stopped payment. He took proceedings and the County Court judge found that he was unfit for the heavy work of a collier, but that his incapacity was due not to the accident but to his prolonged idleness, his muscles having become soft and unfit for hard work. He accordingly awarded in favor of the employers. It was held on appeal that

Disability due to brooding over injury

there was evidence on which the judge could so find. *David v. Windsor Steam Coal Co.* (1911), 4 B. W. C. C. 177.

A workman had the tip of his little finger amputated, after an accident. The wound healed, leaving slight adhesions. After paying compensation for some time, the employers applied for a review. It was admitted that three days before the application to review was heard, another piece of his finger was, under medical advice, amputated. The employers contended that the man would have been fit for work, and that the persistence of the adhesions was due to his unreasonable refusal to resume work, which would have soon broken them down. The County Court judge upheld these contentions and reduced the payments to 1*d.* per week. It was held that there was no evidence to support the findings of the County Court judge, and his ruling was reversed. *Burgess & Co. v. Jewell* (1911), 4 B. W. C. C. 145.

19. Disability due to brooding over injury.

On an application to review and increase a nominal award, the two medical referees of the court reported that the workman, who had been injured by an admitted accident, was, as regards his physical condition, able to resume his usual occupation as a moulder. As to his mental condition, they reported that he had brooded so much over his accident that his mind would not allow him to summon up courage to persevere at his usual work. It was held that the County Court judge was right in finding that the man was not suffering from any incapacity from work which resulted from the injury, but that his inability to work was caused by

brooding over the effects of the accident, and that this was not incapacity within the meaning of the Compensation Act. *Holt v. Yates and Thom* (1909), 3 B. W. C. C. 75.

20. Inability to get employment due to slackness of work.

An injured workman in receipt of part wages and reduced compensation is not entitled to a restoration to full half wages because of his inability to get employment because of the slackness of work. *Dobby v. Wilson, Pease & Co.* (1909), 2 B. W. C. C. 370.

21. Infant earning as much after as he did before accident.

An infant workman was injured and sustained a rupture. After a few weeks he returned to his former work wearing a truss. A year later his employers applied to terminate their liability and proved that he was earning as much as before the accident. It was held that the fact that an infant workman is earning the same wages as before the accident is not necessarily conclusive that the employers are entitled to have the compensation terminated, but the arbitrator should determine whether the earning capacity was the same as it would have been had he not been injured. *Bowhill Coal Co. v. Malcolm* (1910), 47 Scotch L. R. 449; 3 B. W. C. C. 562.

22. Probable earnings of infant in different grade.

An infant skilled laborer, during a slack time, took employment of an unskilled kind, paid at a lower rate. He was injured while in the latter employment and re-

Profits of business enterprise

ceived compensation based on the wages he was receiving when injured. On an application to review he claimed to be entitled to compensation, based on the weekly sum he would probably have been earning at his skilled work. It was held that in estimating the probable earnings of this workman under Schedule I (16), regard may be had to his power of earning money in another employment and in another class of employment than that in which he had been working at the time he was injured. *Evans v. Vickers, Sons and Maxim* (1910), 102 L. T. 199, 3 B. W. C. C. 126, aff'd by House of Lords, *Vickers, Sons and Maxim* (1910), 3 B. W. C. C. 403. In the decision of the House of Lords it was held that the "weekly sum which the workman would probably have been earning" is not limited to what the workman would probably have earned in the same employment under the same employer.

23. Profits of business enterprise as affecting right to reduce compensation.

On an application to review the court can consider as "wages" the profits of a bakery business in which the workman has engaged. *Norman & Burt v. Walder* (1904), 90 L. T. 531; 6 W. C. C. 124.

An injured workman, before the accident, earned an average of £94 per year. After the accident he purchased a public house for £100 and deducting interest on capital and all expenses he still made a net profit of £98. On an application to review the employers contended that although the workman had not recovered from his injuries the incapacity to earn had ceased, as he was earning more since the accident than before.

It was held on appeal, reversing the decision below, that the test was not the man's profits, but the value of the work done had it been offered as services in the open market. *Paterson v. A. G. Moore & Co.* (1910), 47 Scotch L. R. 30; 3 B. W. C. C. 541.

24. Apportioning loss between employer and employé.

Where a man earns something but not enough when added to the compensation payable to equal what he was earning before the injury, an arbitrator is not bound to reduce the payments so that the actual loss to the workman shall be borne equally by him and his employer. *Ellis v. Knott* (1900), 2 W. C. C. 116.

25. Allowance for expenses when work furnished away from home.

Employers who were paying a workman 17s. 5d. a week compensation gave him light work at a different place some miles from home, and then filed an application to review the compensation. The County Court judge reduced the payments, but allowed the man the cost of a week-end ticket and also lodging allowance, as he was compelled to live apart from his family during the week. The family then moved to the place where he was working and on a new application by the employers the judge still further reduced the compensation. On appeal it was held that the decision of the court was on a question of fact and the Court of Appeal would not interfere. *The Taff Vale Railway Co. v. Lane* (1910), 3 B. W. C. C. 297.

26. Diminishing payments; burden of proof.

"Once liability is admitted and payment of an amount for compensation is made, such amount should

Diminishing payments; burden of proof

be the employer's liability until he (the employer) discharges the onus of showing a change of circumstances which entitles him to have the amount diminished." *Maundrell v. Dunkerton Collieries Co.* (1910), 4 B. W. C. C. 76, 78.

On an application to diminish a weekly payment, it was found that the workman could do some light work, *if he could obtain it*; but the employer did not produce any evidence that he could obtain such light work, and the judge refused to reduce the weekly payments. It was held on appeal that the employers had not discharged the onus of proof which was upon them to show that the man could obtain such work. *Proctor and Sons v. Robinson* (1909), 3 B. W. C. C. 41. In the last-mentioned case the court said: "I think the employers here struck too soon. Either they should first obtain some work which the workman could do and offer it to him, and give evidence of this, or else they should give evidence that there is some chance of the workman obtaining a particular kind of light work in the district. Here the employers failed to prove the case they put forward. The burden was upon them and they failed to discharge it."

Where an employer who has been paying compensation contends that the incapacity from the injury has ceased, and that the workman is suffering from a cardiac affection unconnected with the injury, the onus is on the employer of proving this contention on a proceeding to reduce or discontinue the compensation. *Quinn v. M'Callum* (1908), 46 Scotch L. R. 141; 2 B. W. C. C. 339.

The employers applied to review payments under a registered agreement, putting in a certificate of a medi-

Recovering overpayments of compensation

cal referee, obtained in accordance with Schedule I (15), as proof that the workman was fit to work. The man tendered medical evidence in contradiction, but the County Court judge rejected it on the ground that the certificate was conclusive. It was held that the evidence was rightly rejected, the certificate being conclusive. *Sapcote & Sons v. Hancock* (1911), 4 B. W. C. C. 184.

27. Keeping proceeding alive by payment of nominal sum.

On an application to review a weekly payment the County Court judge has jurisdiction to make a suspensory award of, say, 1*d.* per week, or a declaration of liability, it matters not which, for the purpose of keeping alive the workman's claim for compensation, and his right to go back to the judge in the event of new circumstances arising rendering such a course appropriate. *Owners of Vessel "Tynron" v. Morgan* (1909), 100 L. T. 461; 2 B. W. C. C. 406.

28. Recovering overpayments of compensation.

On an application to review an order for compensation, it was held that the weekly payments should be reduced as of a certain antecedent date. The employer refused to make any further payments until the amount of overpayments had been worked off. It was held that the employer had no right to recover overpayments in this way, as his remedy was by action. *B. Hosegood and Sons v. Wilson* (1910), 4 B. W. C. C. 30.

Where an employer, by mistake, has paid more than half wages, he is entitled to have the excess payments set off as to future compensation. *Muller v. The Batavia Line* (1909), 2 B. W. C. C. 495.

Kansas

CALIFORNIA

(L. 1911, c. 399)

The California Act contains no provisions for modifying the award except as set forth in Chapter XXV, *ante*, page 454.

ILLINOIS

(L. 1911, c. 000)

“§ 18. An agreement or award may, at any time after six months and before eighteen months from the date of filing, be reviewed, upon the application of either party, on the ground that the incapacity of the employé has subsequently increased or diminished. Such application shall be made to any court of competent jurisdiction and unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the employé and report upon his condition; and upon his report, and after hearing all the evidence the court may modify such agreement or award, as may be just, by ending, increasing or diminishing the compensation, subject to the limitations hereinbefore provided.”

KANSAS

(L. 1911, c. 218)

“§ 29. *Agreements and awards—when canceled.* At any time within one year after an agreement or award has been so filed, a judge of the district court having jurisdiction may, upon the application of either party, cancel such agreement or award, upon such terms as may be just, if it be shown to his satisfaction that the workman has returned to work and is earning approx-

Massachusetts

imately the same or higher wages as or than he did before the accident, or that the agreement or award has been obtained by fraud or undue influence, or that the committee or arbitrator making the award acted without authority or was guilty of serious misconduct, or that the award is grossly inadequate or grossly excessive, or if the employé absents himself so that a reasonable examination of his condition cannot be made, or has departed beyond the boundaries of the United States or Canada."

"§ 32. Review or modification of agreement or award.

An agreement or award may be modified at any time by a subsequent agreement; or, at any time after one year from the date of filing; it may be reviewed, upon the application of either party on the ground that the incapacity of the workman has subsequently increased or diminished. Such application shall be made to the said district court; and, unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the workman and report to it; and upon his report and after hearing the evidence of the parties, the court may modify such agreement or award, as may be just, by ending, increasing or diminishing the compensation, subject to the limitations hereinbefore provided."

MASSACHUSETTS

(L. 1911, c. 751)

"Part III, § 12. Any weekly payment under this act may be reviewed by the industrial accident board at the request of the association or of the employé; and on such review it may be ended, diminished, or increased, subject to the maximum and minimum amounts above provided, if the board finds that the condition of the employé warrants such action."

New Hampshire

MICHIGAN

(L. 1912, No. 3)

"Part III, § 14. Any weekly payment under this act may be reviewed by the industrial accident board at the request of the employer or the insurance company carrying such risks, or the commissioner of insurance as the case may be, or the employé; and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action."

NEVADA

(L. 1911, c. 183)

There is no provision in the Nevada law on this subject.

NEW HAMPSHIRE

(L. 1911, c. 000)

There is no provision in the New Hampshire Act on this subject.¹

¹ This seems to be a defect in the statute. If, under § 9 (Chapter XXIV, *ante*, page 427) the court makes an order requiring the employer to pay a specified sum weekly and if the condition of the employé should subsequently change, there does not seem to be any specific provision in the statute whereby this relief can be secured. It may possibly be that such relief could be granted under the wording of the latter part of § 9 wherein it is provided that "either such employer or workman may apply to said Superior Court or to any justice thereof in similar proceedings for the determination of any other question that may arise under the compensation feature of this act."

Rhode Island

NEW JERSEY

(L. 1911, c. 95)

An agreement or award of compensation may be modified at any time by a subsequent agreement, or at any time after one year from the time when the same became operative it may be reviewed upon the application of either party on the ground that the incapacity of the injured employé has subsequently increased or diminished. See § 2, paragraph 21 which is discussed in Chapter XI, *ante*, page 299.

OHIO

(L. 1911, c. 000)

“§ 33. *Board of awards may modify acts.* The power and jurisdiction of the Board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified.”

RHODE ISLAND

(L. 1912, c. 571)

“Art. III, § 14. *Review of decrees.* At any time before the expiration of two years from the date of the approval of an agreement, or the entry of a decree fixing compensation, but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement or decree, but not afterwards, any agreement, award, findings or decree may be from time to time reviewed by the superior court upon the application of either party, after due

Washington

notice to the other party, upon the ground that the incapacity of the injured employé had subsequently ended, increased, or diminished. Upon such review the court may increase, diminish, or discontinue the compensation from the date of the application for review, in accordance with the facts, or make such other order as the justice of the case may require, but shall order no change of the status existing prior to the application for review. The finding of the court upon such review shall be served on the parties and filed with the clerk of the court having jurisdiction, in like time and manner and subject to like disposition as in the case of original decrees; *provided* that an agreement for compensation may be modified at any time by a subsequent agreement between the parties approved by the superior court in the same manner as original agreements in regard to compensation are required to be approved by the provisions of section 1 of Article III of this act."

WASHINGTON

(L. 1911, c. 74)

"§ 5. (h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

An increase or rearrangement of an award must be made on application filed with the department. But

Wisconsin

“no increase or rearrangement shall be operative for any period prior to the application therefor.” § 12 (c). See Chapter XXI, *ante*, page 374.

WISCONSIN

(L. 1911, c. 50)

Any compromise can be reviewed and set aside within one year from the time of such compromise. § 2394-15. Chapter XXIV, *ante*, page 448.

CHAPTER XXVII

MANNER OF CREATING INSURANCE FUND, OR OTHER ALTERNATIVE PLAN, IN COMMONWEALTHS WHERE THIS IS REQUIRED OR PERMITTED

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CALIFORNIA

(L. 1911, c. 399)

By Chapter 22 of the Laws of 1911, which was approved by the governor on December 24, 1911, it is provided as follows:

“§ 1. Individuals, partnerships or corporations may exchange reciprocal or interinsurance contracts providing indemnity among each other from loss or from other damages in accordance with the following provisions of this act; *provided*, that no individual, partnership or corporation thus exchanging indemnity shall assume on any single risk an amount greater than ten per cent of the net financial rating of such individual, partnership or corporation; such financial rating to be shown by the reports of a commercial agency having at least one hundred thousand members.

“§ 2. Such individuals, partnerships or corpora-

California

tions so contracting among themselves shall have the power to appoint an attorney, agent or other representative and shall, through their attorney, agent or other representative, file with the insurance commissioner of this State a certificate in writing, verified by the oath of said attorney, agent or other representative, setting forth:

“(a) The name or title by which said individuals, partnerships or corporations intending to make such contracts shall be known. The insurance commissioner may reject any name or title so submitted when the same is an interference with or too similar to one already appropriated or likely to mislead the public in any respect and, in such case, a name not liable to such objection must be chosen.

“(b) A verified copy of the form of policy, contract or agreement under or by which such indemnity is to be exchanged.

“(c) A verified copy of the form of power of attorney or other authority of any said attorney, agent or other representative setting forth the character of such representation and the authority of such representative.

“(d) The location of the office or offices through which said policies, contracts or agreements are to be issued.

“(e) Such attorney in fact shall also file a stipulation or agreement in writing that any notice provided by law or by any insurance policy, proof of loss, summons or other process may be served upon the attorney in fact or upon the insurance commissioner of the State of California, in all actions or in other legal proceedings against such individuals, partnerships or corporations thus exchanging indemnity under the provisions of section 1 of this Act. All

California

notices, proofs of loss, summons or other legal process so served shall give jurisdiction over the person of such individuals, partnerships or corporations thus exchanging indemnity. Whenever such service of notice, proofs of loss, summons or other process shall be made upon the insurance commissioner, he must within ten days thereafter, transmit by mail, postage paid, a copy of such notice, proof of loss, or summons, or other process to the attorney in fact so appointed by such individuals, partnerships or corporations so contracting among themselves and shall be addressed to such attorney in fact at the home or principal office through which such policies are to be issued. The sending of such copy by the insurance commissioner shall be a necessary part of the service of the notice, proof of loss, summons or other process. When any notice, summons or other legal process is served upon the insurance commissioner pursuant to the provisions of this section, the service as to such individuals, partnerships, or corporations thus exchanging indemnity shall be deemed complete at the end of sixty days after the date of the mailing of such copy of such notice, proof of loss, summons or other legal process to the attorney in fact as herein provided for.

“(f) The attorney, agent or other representative shall, whenever and as often as the same shall be requested, file with the insurance commissioner a statement verified by his oath to the effect that he has examined the commercial rating of the individuals, partnerships or corporations, composing the subscribers in such reciprocal or interinsurance exchange as shown by a commercial agency having at least one hundred thousand subscribers and that, for such examination, it appears that no subscriber of such exchange has assumed on any single risk an amount of

California

liability greater than ten per cent of the net financial rating of such subscriber when such risk was assumed.

“(g) There shall also be filed with the insurance commissioner by any said attorney, agent or other representative, a written stipulation to the effect that all insurance written by him upon risks situated within this state shall be deemed to be business done in this state and within the terms and subject as to taxation to the provisions of section 14 of article 13 of the constitution of this state.

“§ 3. The agent, attorney or other representative by or through whom are issued or negotiated any policies of or contracts or agreements for any insurance or indemnity of the character referred to in section one of this act shall procure from the insurance commissioner a certificate of authority stating that all the requirements of this act have been complied with and upon such compliance and the payment of a fee of fifty dollars the insurance commissioner shall issue such certificate. Such certificate must be renewed annually, for which a fee of ten dollars shall be paid. Any such certificate so issued as above may be revoked or suspended by the insurance commissioner if any such individuals, partnerships or corporations exchanging indemnity under the provisions of this act fail to comply with any or all of the requirements of this act.

“§ 4. The attorney in fact of such individuals, partnerships or corporations composing such reciprocal or interinsurance exchange shall file with the insurance commissioner of this state, on or before the first of March of each year, upon forms to be prepared by the insurance commissioner, a statement which must exhibit the condition and affairs of such exchange on the 31st day of December then next preceding.

California

“§ 5. The insurance commissioner, whenever he deems necessary, must make an examination of the condition and affairs relating to the exchange of indemnity of such individuals, partnerships or corporations composing such reciprocal or interinsurance exchange and must make such an examination before issuing its original certificate of authority to do business in this state; or where the home office of the interinsurance or reciprocal exchange is located outside of the State of California, and when such interinsurance or reciprocal exchange is licensed by the insurance commissioner or department of the state where such home office is located, the insurance commissioner shall accept as satisfactory a certificate of compliance issued by the insurance commissioner or department of the state where said home office is located. Such examination shall verify the certificate and statement filed by the attorney in fact. Such exchange must open its books and papers for the inspection of the insurance commissioner and shall otherwise facilitate such examination and the commissioner may administer oaths and examine under oath any person relative to the contracts of such exchange, and if he finds the books to have been carelessly or improperly kept or posted he must employ sworn experts to rewrite, post and balance the same at the expense of such individuals, partnerships or corporations composing such reciprocal or interinsurance exchange. Such examination must be conducted in the county where such individuals, partnerships or corporations composing such reciprocal or interinsurance exchange has its principal office and must be private. Whenever the commissioner shall make such examination as aforesaid the same must be at the expense of the individuals, partnerships and corpora-

California

tions composing such reciprocal or interinsurance exchange; such expense to be paid in advance, and in the event or refusal to pay such expenses the insurance commissioner may refuse to issue any such certificate of authority and must revoke any existing certificate of authority authorizing such individuals, partnerships and corporations composing such reciprocal or interinsurance exchange to execute such contracts of indemnity.

"§ 6. Unincorporated interindemnity companies who do not issue policies of insurance, who do not charge expenses of management except in liquidation of losses, nor accept premiums from its members shall be exempt from the provisions of this act.

"§ 7. All policies and insurance contracts or contracts of indemnity upon a risk or risks situated in the State of California, held by an individual, partnership or corporation as a subscriber of any reciprocal or interinsurance exchange which exchange is not authorized to do business in the State of California shall be null and void; *provided*, that any insurance agreement or agreement for indemnity on goods between states or territory and states or to or from a foreign country or the property of common carriers used by such common carriers in the transaction of interstate commerce or commerce with foreign countries, shall be deemed not void.

"§ 8. For the purpose of taxation under the provisions of section 14 of article 13 of the constitution of the State of California all contracts of indemnity upon risks located in this state between individuals, partnerships and corporations under the provisions of this act shall be deemed to be contracts of insurance upon business done in this state under and subject to the provisions of such section 14 article 13 of the constitution of the State of California.

Kansas

“§ 9. Individuals, partnerships and corporations exchanging reciprocal or interinsurance and contracts providing indemnity among each other shall be exempt from the provisions of other insurance laws of this state.

ILLINOIS

(L. 1911, c. 000)

There is no provision in the Illinois Act on this subject.

KANSAS

(L. 1911, c. 218)

“§ 39. *Certificate required.* If the superintendent of insurance by and with the advice and written approval of the attorney general certifies that any scheme of compensation, benefit or insurance for the workman of an employer in any employment to which this act applies, whether or not such scheme includes other employers and their workman, provides scales of compensation not less favorable to the workman and their dependents than the corresponding scales contained in this act, and that, where the scheme provides for contributions by the workman, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this act or their equivalents, the employer, may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this act; and thereupon the employer shall be liable only in accordance with that scheme; but, save as aforesaid, this act shall not apply notwithstanding any contract to the contrary made after this act becomes a law.

Massachusetts

"§ 40. *Condition to certificate.* No scheme shall be so certified which does not contain suitable provisions for the equitable distribution of any moneys or securities held for the purpose of the scheme, after due provision has been made to discharge the liabilities already accrued, if and when such certificate is revoked or the scheme otherwise terminated.

"§ 41. *Certificate to be revocable.* If at any time the scheme no longer fulfills the requirements of this article, or is not fairly administered, or other valid and substantial reasons therefor exist, the superintendent of insurance by and with the attorney general shall revoke the certificate and the scheme shall thereby be terminated.

"§ 42. *Information to be reported.* Where a certified scheme is in effect the employer shall answer all such inquiries and furnish all such accounts in regard thereto as may be required by the superintendent.

"§ 43. The superintendent of insurance may make all rules and regulations necessary to carry out the purposes of the four preceding sections."

MASSACHUSETTS

(L. 1911, c. 751)

"PART IV

"THE MASSACHUSETTS EMPLOYÉS INSURANCE ASSOCIATION

"§ 1. The Massachusetts Employés Insurance Association is hereby created a body corporate with the powers provided in this act and with all the general corporate powers incident thereto.

"§ 2. The governor shall appoint a board of directors of the association, consisting of fifteen members, who shall serve for a term of one year, or until their

successors are elected by ballot by the subscribers at such time and for such term as the by-laws shall provide.

“§ 3. Until the first meeting of the subscribers the board of directors shall have and exercise all the powers of the subscribers, and may adopt by-laws not inconsistent with the provisions of this act, which shall be in effect until amended or repealed by the subscribers.

“§ 4. The board of directors shall annually choose by ballot a president who shall be a member of the board, a secretary, a treasurer, and such other officers as the by-laws shall provide.

“§ 5. Seven or more of the directors shall constitute a quorum for the transaction of business. Vacancies in any office may be filled in such a manner as the by-laws shall provide.

“§ 6. Any employer in the commonwealth may become a subscriber.

“§ 7. The board of directors shall, within thirty days of the subscription of twenty-five employers, call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his place of business not less than ten days before the date fixed for the meeting.

“§ 8. In any meeting of the subscribers each subscriber shall be entitled to one vote, and if a subscriber has five hundred employes to whom the association is bound to pay compensation he shall be entitled to two votes, and he shall be entitled to one additional vote for each additional five hundred employes to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right or by the right of proxy, more than twenty votes.

“§ 9. No policy shall be issued by the association

until not less than one hundred employers have subscribed, who have not less than ten thousand employés to whom the association may be bound to pay compensation.

"§ 10. No policy shall be issued until a list of the subscribers, with the number of employés of each, together with such other information as the insurance commissioner may require, shall have been filed at the insurance department, nor until the president and secretary of the association shall have certified under oath that every subscription in the list so filed is genuine and made with an agreement by every subscriber that he will take the policies subscribed for by him within thirty days of the granting of a license to the association by the insurance commissioner to issue policies.

"§ 11. If the number of subscribers falls below one hundred, or the number of employés to whom the association may be bound to pay compensation falls below ten thousand, no further policies shall be issued until other employers have subscribed, who, together with existing subscribers, amount to not less than one hundred who have not less than ten thousand employés, said subscriptions to be subject to the provisions contained in the preceding section.

"§ 12. Upon the filing of the certificate provided for in two preceding sections the insurance commissioner shall make such investigation as he may deem proper and, if his findings warrant it, grant a license to the association to issue policies.

"§ 13. The board of directors shall distribute the subscribers into groups in accordance with the nature of the business and the degree of the risk of injury. Subscribers within each group shall annually pay in cash, or notes absolutely payable, such premiums as

Massachusetts

may be required to pay the compensation herein provided for the injuries which may occur in that year.

“§ 14. The association may in its by-laws and policies fix the contingent mutual liability of the subscribers for the payment of losses and expenses not provided for by its cash funds; but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium.

“§ 15. If the association is not possessed of cash funds above its unearned premiums sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon the subscribers liable to assessment therefor in proportion to their several liability. Every subscriber shall pay his proportional part of any assessment which may be laid by the association, in accordance with law and his contract, on account of injuries sustained and expenses incurred while he is a subscriber.

“§ 16. The board of directors may, from time to time, by vote fix and determine the amount to be paid as a dividend upon policies expiring during each year after retaining sufficient sums to pay all the compensation which may be payable on account of injuries sustained and expenses incurred. All premiums, assessments, and dividends shall be fixed by and for groups as heretofore provided in accordance with the experience of each group, but all the funds of the association and the contingent liability of all the subscribers shall be available for the payment of any claim against the association.

“§ 17. Any proposed premium, assessment, dividend or distribution of subscribers shall be filed with the insurance department and shall not take effect

until approved by the insurance commissioner after such investigation as he may deem necessary.

"§ 18. The board of directors shall make and enforce reasonable rules and regulations for the prevention of injuries on the premises of subscribers, and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours. Any subscriber or employé aggrieved by any such rule or regulation may petition the industrial accident board for a review, and it may affirm, amend, or annul the rule or regulation.

"§ 19. If any officer of the association shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury.

"§ 20. Every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment to injured employés by the association.

"§ 21. Every subscriber shall give notice in writing or print to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employés by the association. If an employer ceases to be a subscriber he shall, on or before the day on which his policy expires, give notice thereof in writing or print to all persons under contract with him. In case of the renewal of the policy no notice shall be required under the provisions of this act. He shall file a copy of said notice with the Industrial Accident Board. The notices required by this and the preceding section may be given in the manner therein provided or in such other manner as may be approved in the Industrial Accident Board." (As amended by L. 1912, c. 571.)

"§ 22. If a subscriber, who has complied with all

Michigan

the rules, regulations and demands of the association, is required by any judgment of a court of law to pay to an employé any damages on account of personal injury sustained by such employé during the period of subscription, the association shall pay to the subscriber the full amount of such judgment and the cost assessed therewith, if the subscriber shall have given the association notice in writing of the bringing of the action upon which the judgment was recovered and an opportunity to appear and defend the same.

“§ 23. The provisions of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven and of acts in amendment thereof shall apply to the association, so far as such provisions are pertinent and not in conflict with the provisions of this act, except that the corporate powers shall not expire because of failure to issue policies or make insurance.

“§ 24. The board of directors appointed by the governor under the provisions of Part IV, section two, may incur such expenses in the performance of its duties as shall be approved by the governor and council. Such expenses shall be paid from the treasury of the commonwealth and shall not exceed in amount the sum of fifteen thousand dollars.

MICHIGAN

(L. 1912, c. 000)

“PART IV

“METHOD OF PAYMENT

“§ 1. Every employer filing his election to become subject to the provisions of this act, as hereinbefore set forth, shall have the right to specify at the time of

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doing so, subject to the approval of said industrial accident board, which of the following methods for the payment of such compensation he desires to adopt, to-wit:

"First. Upon furnishing satisfactory proof to said board of his solvency and financial ability to pay the compensation and benefits hereinbefore provided for, to make such payments directly to his employés, as they may become entitled to receive the same under the terms and conditions of this act; or

"Second. To insure against such liability in any employers' liability company authorized to take such risks in the state of Michigan; or

"Third. To insure against such liability in any employers' insurance association organized under the laws of the state of Michigan; or

"Fourth. To request the commissioner of insurance of the state of Michigan to assume the administration of the disbursement of such compensation exclusive of that provided for in part two, section four herein, and the collection of the premiums and assessments necessary to pay the same, as provided in part five hereof. Said board, however, shall have the right, from time to time to review and alter its decision in approving the election of such employer to adopt any one of the foregoing methods of payment, if in its judgment such action is necessary or desirable to secure and safeguard such payments to employés.

"§ 2. Nothing herein shall affect any existing contract for employers' liability insurance or affect the organization of any mutual or other insurance company, or any arrangement now existing between employers and employés, providing for the payment to such employés, their families, dependents or representatives, sick, accident or death benefits, in addition to

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the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right to enforce in his own name in the manner provided in this act the liability of any insurance company or of any employers' association organized under the laws of the state of Michigan, or the commissioner of insurance, who may, in whole or in part, have insured the liability for such compensation: Provided, however, That payment in whole or in part of such compensation by either the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, shall, to the extent thereof be a bar to recovery against the other, of the amount so paid.

"§ 3. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract for insurance, unless such company shall have been approved by the commissioner of insurance as provided by law.

"§ 4. Any employer against whom liability may exist for compensation under this act may, with the approval of the industrial accident board, be relieved therefrom by:

"1. Depositing the present value of the total unpaid compensation for which such liability exists, assuming interest at three per centum per annum,

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with such trust company of this state as shall be designated by the employé, or by his dependents, in case of his death, and such liability exists in their favor, or in default of such designation by him, or them, after ten days' notice in writing from the employer, with such trust company of this state as shall be designated by the industrial accident board; or

"2. By the purchase of an annuity, within the limitation provided by law, in any insurance company granting annuities and licensed in this state, which may be designated by the employé, or his dependents, or the industrial accident board, as provided in subsection one of this section."

"PART V

"ADMINISTRATION BY COMMISSIONER OF INSURANCE

"§ 1. Whenever five or more employers, who have become subject to the provisions of this act, and who have on their pay rolls an aggregate number of not less than three thousand employés, shall in writing request the commissioner of insurance so to do, he shall assume charge of levying and collection from them such premium and dividends as may from time to time be necessary to pay the sums which shall become due their employés, or dependents of their employés, as compensation under the provisions of this act, and also the expense of conducting the administration of such funds; and shall disburse the same to the persons entitled to receive such compensation under the provisions of this act: Provided, however, That neither the commissioner of insurance nor the state of Michigan shall become or be liable or responsible for the payment of claims for compensation under the provisions of this act beyond the ex-

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tent of the funds so collected and received by him as hereinafter provided.

"§ 2. The commissioner of insurance shall immediately upon assuming the administration of the collection and disbursement of the moneys referred to in the preceding section, cause to be created in the state treasury a fund to be known as "accident fund." Each such employer shall contribute to this fund to the extent of such premiums or assessments as the commissioner shall deem necessary to pay the compensation accruing under this act to employés of such employers or to their dependents, which premiums and assessments shall be levied in the manner and proportion hereinafter set forth. The commissioner of insurance shall give a good and sufficient bond in the sum of twenty-five thousand dollars, executed by some surety company authorized to do business in the state of Michigan, covering the collection and disbursement of all moneys that may come into his hands under the provisions of this act. The premium on said bond shall be paid out of the general funds of the state on an order of the auditor general. Said bond must be approved by the board of state auditors.

"§ 3. It is the intention that the amounts raised for such fund shall ultimately become neither more nor less than self-supporting, and the premiums or assessments levied for such purpose shall be subject to readjustment from time to time by the commissioner of insurance as may become necessary.

"§ 4. The commissioner of insurance may classify the establishments or works of such employers in groups in accordance with the nature of the business in which they are engaged and the probable risk of injury to their employés under existing conditions. He shall

determine the amount of the premiums or assessments which such employers shall pay to said accident fund, and may prescribe when and in what manner such premiums and assessments shall be paid, and may change the amount thereof both in respect to any or all of such employers from time to time, as circumstances may require, and the condition of their respective plants, establishments or places of work in respect to the safety of their employes may justify, but all such premiums or assessments shall be levied on a basis that shall be fair, equitable and just as among such employers. At the beginning of each fiscal year it shall be the duty of the commissioner of insurance to call for the required payment of premiums in such amounts as shall, together with any balance in the accident fund, in his judgment, and subject to the approval of said industrial accident board, be sufficient to enable him to pay all sums which may become due and payable to the employes of any such employer who has become subject to the provisions of part five of this act, and also the expenses of administering such funds during the following year.

"§ 5. If any employer shall make default in the payment of any contribution, premium or assessment required as aforesaid by the commissioner of insurance, the sum due shall be collected by an action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In case any injury happens to any of the workmen of such employer during the period of any default in the payment of any such premium, assessment or contribution, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act,

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but shall be liable to suit by the injured workman, or by his dependents in case death results from such accident, as if he had not elected to become subject to this act. In case, however, the amount actually collected in by such injured workman or his dependents shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of said accident fund. If the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section shall have the choice, to be exercised before suit, of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the state for the benefit of the accident fund.

“§ 6. Any employer subject to the provisions of part five of this act, who has complied with all the rules, regulations and demands of the industrial accident board and the commissioner of insurance, may withdraw therefrom at the expiration of the period of one year for which he has elected to become subject to the provisions of this act: Provided, however, That he shall give written notice of such withdrawal to said commissioner of insurance at least thirty days before the expiration of such period: And Provided further, That if at the time of such withdrawal liability may exist against employer for compensation to employés who have been theretofore killed or injured, as hereinbefore provided, such employer shall either relieve himself and the commissioner of insurance from such liability in the manner provided in part four, section four of this act, or shall otherwise protect and indemnify said com-

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missioner of insurance against such liability in such reasonable manner as he may require.

"§ 7. In case any controversy shall arise between the commissioner of insurance and any employer subject to the provisions of part five of this act, relative to any rule or regulation adopted by said commissioner of insurance, or any decision made by him in respect to the collection, administration and disbursement of such funds, or in case any controversy shall arise between any employé claiming compensation under the provisions of this act and said commissioner of insurance, all such controversies of every kind and nature shall be subject to review in like manner and with the same force and effect in all respects as is heretofore provided in respect to differences arising through the administration of such funds by the employer, or by a liability insurance company or by an employers' mutual insurance association.

"§ 8. The books, records and pay rolls of each employer subject to the provisions of part five of this act shall always be open to inspection by the commissioner of insurance, or his duly authorized agent or representative, for the purpose of ascertaining the correctness of the amount of the pay roll reported, the number of men employed, and such other information as said commissioner may require in the administration of said funds. Refusal on the part of any such employer to submit said books, records and pay rolls for such inspection, shall subject the offending employer to a penalty of fifty dollars for each offense, to be collected by civil action in the name of the state and paid unto the accident fund, and the individual who shall personally give such refusal shall be guilty of a misdemeanor.

"§ 9. The commissioner of insurance shall issue

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proper receipts for all moneys so collected and received from employers, as aforesaid, shall take receipts for all sums paid to employés for compensation under the provisions of this act, and shall keep full and complete records of all business transacted by him in the administration of such funds. He may employ such deputies and assistants and clerical help as may be necessary, and as the board of state auditors may authorize, for the proper administration of said funds and the performance of the duties imposed upon him by the provisions of this act, at such compensation as may be fixed by said board of state auditors, and may also remove them. The commissioner of insurance and such deputies and assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board, but all such salaries and expenses so authorized by the provisions of this act shall be charged to and paid out of said accident fund. He shall include in his annual report a full and correct statement of the administration of such fund, showing its financial status and outstanding obligations, the claims and the amount paid on each claim, claims not paid, claims contested and why, and general statistics in respect to all business transacted by him under the provisions of this act.

“§ 10. Disbursements from said accident fund shall be made only upon warrants approved by the board of state auditors upon vouchers therefor transmitted to it by the commissioner of insurance. If at any time there shall not be sufficient money in said fund wherewith to pay the same, the employer on account of whose workmen it was that such warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount

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so paid, with interest thereon at the legal rate, from the date of such payment to the date such next following contribution becomes payable, and if the amount of the credit shall exceed the amount of the contribution, he shall be repaid such excess.

"§ 11. If this act shall be thereafter repealed, all moneys which are in the accident fund at the time of such repeal shall be subject to disposition under the direction of the circuit court for the county of Ingham, with due regard, however, to the obligation incurred and existing to pay compensation under the provisions of this act."

NEVADA

(L. 1911, c. 183)

There is no provision in the Nevada law on this subject.

NEW HAMPSHIRE

(L. 1911, c. 000)

See § 3 in Chapter II, *ante*, page 155, which requires an employer to demonstrate his financial ability to comply with the provisions of the statute or give a bond.

NEW JERSEY

(L. 1911, c. 95)

New Jersey has not provided for any form of State insurance or mutual associations.

OHIO

(L. 1911, c. 000)

"§ 17. *Classification of employments.* The State Liability Board of Awards shall classify employments

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with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total pay roll and number of employés in each of said classes of employment, sufficiently large to provide an adequate fund for the compensation provided for in this act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year.

“§ 18. *State insurance fund.* The State Liability Board of Awards shall establish a state insurance fund from premiums paid thereto by employers of labor and employés as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefits of employés of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such employés, and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund.

“§ 19. *Custodian of fund.* The treasurer of state shall be the custodian of the state insurance fund, and all disbursement therefrom shall be paid by him, but upon vouchers signed by any two members of the State Liability Board of Awards.

“§ 20. *Bond.* The treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund herein provided for.

“§ 20-1. *Duties of employers who pay fund.* Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this

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act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employé, wherever occurring, during the period covered by such premiums, provided the injured employé has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employé of his right of action as aforesaid.

Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employés of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted.

“§ 20-2. *Premiums to be paid.* For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employés in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the State Liability Board of Awards. The said employers for themselves and their employés shall make such payments to the state treasurer of Ohio, who will receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employés in the following proportions, to wit: Ninety per

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cent of the premium shall be paid by the employer and ten per cent by the employés. Each employer is authorized to deduct from the pay roll of his employés ten per cent of the said premiums for any premium period in proportion to the pay roll of such employés; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employé showing the amount which has been deducted and paid into the state insurance fund.

RHODE ISLAND

(L. 1912, c. 000)

"ARTICLE IV

"ALTERNATIVE SCHEMES PERMITTED

"§ 1. *Employer and employé may agree.* Any employer may enter into an agreement with his employés in any employment to which this act applies to provide a scheme of compensation, benefit, or insurance, in lieu of the compensation provided for in this act, subject to the approval of the superior court. Such approval shall be granted only on condition that the scheme proposed provides as great benefits as those provided by this act; and, if the scheme provides for contributions by employés, it shall confer additional benefits at least equivalent to these contributions. If such a scheme meets with the approval of said court, the clerk shall issue a certificate enabling the employer to contract with any or all of his employés in employments to which this act applies to substitute such scheme for the provisions of this act for a period of not more than five years.

"§ 2. *Agreement must contain.* No scheme which

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provides for contributing by employés shall be so certified which does not contain suitable provisions for the equitable distribution of any money or securities held for the purpose of the scheme, after due provision has been made to discharge the liabilities already incurred, if and when such certificate is revoked or the scheme otherwise terminated.

"§ 3. *Agreement revoked.* If at any time the scheme no longer fulfills the requirements of this Article, or is not fairly administered, or any other valid and substantial reason therefor exists, the superior court, on reasonable notice to the interested parties, shall revoke the certificate and the scheme shall thereby be terminated."

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(L. 1911, c. 74)

"§ 4. *Schedule of contribution.* Insomuch as industry should bear the greater portion of the burden of the costs of its accidents, each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with the following schedule, a sum equal to a percentage of his total pay roll for that year, to-wit: (the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard):

"CONSTRUCTION WORK

"Tunnels; bridges; trestles; sub-aqueous works; ditches and canals (other than irrigation without blasting); dock excavation; fire escapes; sewers; house moving; house wrecking.065
"Iron, or steel frame structures or parts of structures.080
"Electric light or power plants or systems; tele-	

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graph or telephone systems; pile driving; steam railroads.050
"Steeple, towers or grain elevators, not metal framed; dry-docks without excavation; jet- ties; breakwaters; chimneys; marine railways; water-works or systems; electric railways with rock work or blasting; blasting; erecting fireproof doors or shutters.050
"Steam heating plants; tanks, water towers or wind-mills, not metal frames.040
"Shaft sinking.060
"Concrete buildings; freight or passenger ele- vators; fireproofing of buildings; galvanized iron or tin works; gas works, or systems; marble, stone or brick work; road making with blasting; roof work; safe moving; slate work; outside plumbing work; metal smoke- stacks or chimneys.050
"Excavations not otherwise specified; blast furnaces.040
"Street or other grading; cable or electric street railways without blasting; advertising signs; ornamental metal work in buildings.035
"Ship or boat building or wrecking with scaf- folds; floating docks.045
"Carpenter work not otherwise specified.035
"Installation of steam boilers or engines; plac- ing wire in conduits; installing dynamos; put- ting up belts for machinery; marble, stone or tile setting, inside work; mantle setting; metal ceiling work; mill or ship wrighting; painting of buildings or structures; installa- tion of automatic sprinklers; ship or boat rigging; concrete laying in floors, foundations or street paving; asphalt laying; covering	

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steam pipes or boilers; installation of machinery not otherwise specified.030
"Drilling wells; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems; glass setting; building hot houses; lathing; paper hanging; plastering; inside plumbing; wooden stair building; road making.020
"OPERATION (INCLUDING REPAIR WORK) OF	
"(All combinations of material take the higher rate when not otherwise provided.)	
"Logging railroads; railroads; dredges; interurban electric railroads using third rail system; dry or floating docks.050
"Electric light or power plants; interurban electric railroads not using third rail system; quarries.040
"Street railways, all employés; telegraph or telephone systems; stone crushing; blasting furnaces; smelters; coal mines; gas works; steamboats; tugs; ferries.030
"Mines, other than coal; steam heating or power plants.025
"Grain elevators; laundries; waterworks; paper or pulp mills; garbage works.020
"FACTORIES USING POWER-DRIVEN MACHINERY	
"Stamping tin or metal.045
"Bridge work; railroad car or locomotive making or repairing; cooperage; logging with or without machinery; saw mills; shingle mills; staves; veneer; box; lath; packing cases; sash, door or blinds; barrel; keg; pail; basket; tub; wooden ware or wooden fiber ware; roll-	

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ing mills; making steam shovels or dredges; tanks; water towers; asphalt; building material not otherwise specified; fertilizer; cement; stone with or without machinery; kindling wood; masts and spars with or without machinery; canneries, metal stamping extra; creosoting works; pile treating works.025
"Excelsior; iron, steel, copper, zinc, brass or lead articles or wares not otherwise specified; working in wood not otherwise specified; hardware; tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware; peat fuel; brickettes.020
"Breweries; bottling works; boiler works; foundries; machine shops not otherwise specified.020
"Cordage; working in food stuffs, including oils, fruits and vegetables; working in wool, cloth, leather, paper, broom, brush, rubber or textiles not otherwise specified.015
"Making jewelry, soap, tallow, lard, grease, condensed milk.015
"Creameries; printing; electrotyping; photo-engraving; lithographing.015
 "MISCELLANEOUS WORK 	
"Stevedoring; longshoring.030
"Operating stock yards, with or without railroad entry; packing houses.025
"Wharf operation; artificial ice, refrigerating or cold storage plants; tanneries; electric systems not otherwise specified.020
"Theater stage employés.015
"Fire works manufacturing.050
"Powder works.100

"The application of this act as between employers and workmen shall date from and include the first day of October, 1911. The payment for 1911 shall be made prior to the day last named, and shall be preliminarily collected upon the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts shall be made upon the basis of the actual pay roll. Any shortage shall be made good on or before February 1st, following. Every employer who shall enter into business at any intermediate day shall make his payment for the initial year or portion thereof before commencing operation; its amount shall be calculated upon his estimated pay roll, an adjustment shall be made on or before February 1st of the following year in the manner above provided.

"For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: *Provided*, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first

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lapsed payment, as may be necessary to meet such requirements of the accident fund.

"The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act.

"In that the intent is that the fund created under this section shall ultimately become neither more or less than self supporting, exclusive of the expense or administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.

"It shall be unlawful for the employer to deduct or obtain any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deduction shall be a gross misdemeanor. If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. Any such change in classification of risks or premium rates, or any change caused by change in the class of work, occurring during the year shall, at the time of the annual adjustment, be adjusted by the department in proportion to its duration in accordance with the schedule of this section. If, at the end of any year, it shall be seen that the contribution to the accident

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fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year.

"For the purposes of such payment and making good of deficit the particular classes of industry shall be as follows:

"CONSTRUCTION WORK

"Class 1. Tunnels; sewer; shaft sinking; drilling wells.

"Class 2. Bridges; mill wrighting; trestles; steeples, towers or grain elevators not metal framed; tanks, water towers, wind-mills not metal framed.

"Class 3. Sub-aqueous works; canal other than irrigation or docks with or without blasting; pile driving; jetties; breakwaters; marine railways.

"Class 4. House moving; house wrecking; safe moving.

"Class 5. Iron or steel frame structures or parts of structures; fire escapes; erecting fire-proof doors or shutters; blast furnaces; concrete chimneys; freight or passengers elevators; fire proofing of buildings; galvanized iron or tin work; marble, stone or brick work; roof work; slate work; plumbing work; metal smoke stack or chimneys; advertising signs; ornamental metal work in buildings; carpenter work not otherwise specified; marble, stone or tile setting; mantle setting; metal ceiling work; painting of buildings or structures; concrete laying in floors or foundations; glass setting; building hot houses; lathing; paper hanging; plastering; wooden stair building.

"Class 6. Electric light and power plants or system;

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telegraph or telephone systems; cable or electric railways with or without rock work or blasting; water-works or systems; steam heating plants; gas works or systems; installation of steam boilers or engines; placing wires in conduits; installing dynamos; putting up belts for machinery; installation of automatic sprinklers; covering steam pipes or boilers; installation of machinery not otherwise specified; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems.

"Class 7. Steam railroads; logging railroads.

"Class 8. Road making; street or other grading; concrete laying in street paving; asphalt laying.

"Class 9. Ship or boat building with scaffolds; ship wrighting; ship or boat rigging; floating docks.

"OPERATION (INCLUDING REPAIR WORK) OF

"Class 10. Logging; saw mills; shingle mills; lath mills; masts and spars with or without machinery.

"Class 12. Dredges; dry or floating docks

"Class 13. Electric light or power plants or systems; steam heat or power plants or systems; electric systems not otherwise specified.

"Class 14. Street railways.

"Class 15. Telegraph systems; telephone systems.

"Class 16. Coal mines.

"Class 17. Quarries; stone crushing; mines other than coal.

"Class 18. Blast furnaces; smelters; rolling mills.

"Class 19. Gas works.

"Class 20. Steamboats; tugs; ferries.

"Class 21. Grain elevators.

"Class 22. Laundries.

"Class 23. Water works.

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"Class 24. Paper or pulp mills.

"Class 25. Garbage works; fertilizer.

"FACTORIES (USING POWER-DRIVEN MACHINERY)

"Class 26. Stamping tin or metal.

"Class 27. Bridge work; making steam shovels or dredges; tanks; water towers.

"Class 28. Railroad car or locomotive making or repairing.

"Class 29. Cooperage; staves; veneer; box; packing cases; sash [,] door or blinds; barrel; keg; pail; basket; tub; wood ware or wood fiber ware; kindling wood; excelsior; working in wood not otherwise specified.

"Class 30. Asphalt.

"Class 31. Cement; stone with or without machinery; building material not otherwise specified.

"Class 32. Canneries of fruits or vegetables.

"Class 33. Canneries of fish or meat products.

"Class 34. Iron, steel, copper, zinc, brass or lead articles or wares; hardware; boiler works; founderies; machine shops not otherwise specified.

"Class 35. Tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware."

"Class 36. Peat fuel; brickettes.

"Class 37. Breweries; bottling works.

"Class 38. Cordage; working in wool, cloth, leather, paper, brush, rubber or textile not otherwise specified.

"Class 39. Working in food stuffs, including oils, fruits, vegetables.

"Class 40. Condensed milk; creameries.

"Class 41. Printing, electrotyping; photo-engraving; engraving; lithographing; making jewelry.

"Class 42. Stevedoring; longshoring; wharf operation.

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"Class 43. Stock yards; packing houses; making soap, tallow, lard, grease; tanneries.

"Class 44. Artificial ice, refrigerating or cold storage plants.

"Class 45. Theater stage employés.

"Class 46. Fire works manufacturing; powder works.

"Class 47. Creosoting works; pile treating works.

"If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay roll of each occupation if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employés and the relative hazards. If an employer besides employing workmen in extra hazardous employment shall also employ workmen in employments not extra hazardous the provisions of this act shall apply only to the extra hazardous departments and employments and the workmen employed therein. In computing the pay roll the entire compensation received by every workman employed in extra hazardous employment shall be included, whether it be in the form of salary, wage, piece work, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise.

"§ 5. (e) For every case of injury resulting in death or permanent total disability it shall be the duty of the department to forthwith notify the state treasurer, and he shall set apart out of the accident fund a sum of money for the case, to be known as the estimated lump value of the monthly payments provided for it, to be calculated upon the theory that a monthly payment of twenty dollars, to a person thirty years of age,

is equal to a lump sum payment, according to the expectancy of life as fixed by the American Mortality Table, of four thousand dollars, but the total in no case to exceed the sum of four thousand dollars. The state treasurer shall invest said sum at interest in the class of securities provided by law for the investment of the permanent school fund, and out of the same and its earnings shall be paid the monthly installments and any lump sum payment then or thereafter arranged for the case. Any deficiency shall be made good out of, and any balance or overplus shall revert to the accident fund. The state treasurer shall keep accurate account of all such segregations of the accident fund, and may borrow from the main fund to meet monthly payments pending conversion into cash of any security, and in such case shall repay such temporary loan out of the cash realized from the security."

"§ 9. *Employer's responsibility for safeguard.* If any workman shall be injured because of the absence of any safeguard or protection required to be provided or maintained by, or pursuant to, any statute or ordinance, or any departmental regulation under any statute, or be, at the time of the injury, of less than the maximum age prescribed by law for the employment of a minor in the occupation in which he shall be engaged when injured, the employer shall, within ten days after demand therefor by the department, pay into the accident fund, in addition to the same required by section 4 to be paid:

"(a) In case the consequent payment to the workman out of the accident fund be a lump sum, a sum equal to 50 per cent of that amount.

"(b) In case the consequent payment to the workman be payable in monthly payments, a sum equal to

50 per cent of the lump value of such monthly payment, estimated in accordance with the rule stated in § 7.

"The foregoing provisions of this act shall not apply to the employer if the absence of such guard or protection be due to the removal thereof by the injured workman himself or with his knowledge by any of his fellow workmen, unless such removal be by order or direction of the employer or superintendent or foreman of the employer, or any one placed by the employer in control or direction of such workman. If the removal of such guard or protection be by the workman himself or with his consent by any of his fellow workmen, unless done by order or direction of the employer or the superintendent or foreman of the employer, or any one placed by the employer in control, or direction of such workman, the schedule of compensation provided in § 5 shall be reduced 10 per cent for the individual case of such workman.

"§ 15. *Inspection of employer's books.* The books, records and pay rolls of the employer pertinent to the administration of this act shall always be open to inspection by the department or its traveling auditor, agent or assistant, for the purpose of ascertaining the correctness of the pay roll, the men employed, and such other information as may be necessary for the department and its management under this act. Refusal on the part of the employer to submit said books, records and pay rolls for such inspection to any member of the commission, or any assistant presenting written authority from the commission, shall subject the offending employer to a penalty of one hundred dollars for each offense, to be collected by civil action in the name of the state and paid into the accident fund, and the individual who shall personally give such refusal shall be guilty of misdemeanor."

Wisconsin

For a misrepresentation as to a pay roll an employer is subject to a penalty of ten times the amount of the difference in premium paid and the amount the employer should have paid. § 16. See Chapter XXVIII, *post*, page 534.

WISCONSIN

(L. 1911, c. 50)

For provision as to mutual insurance companies and plans see § 2394-26, Chapter XXXIII, *post*, page 565.

CHAPTER XXVIII

PENALTIES FOR FAILURE TO COMPLY WITH LAW

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The proceedings in an arbitration before a County Court judge under the Workmen's Compensation Act, are judicial proceedings, and therefore a witness who in such proceedings gives false evidence on a material question may be indicated for perjury. *Rex v. Crossley* (1909), 2 B. W. C. C. 451.

CALIFORNIA

(L. 1911, c. 399)

The statute seems to contain no penalties except the abolition of common law defenses when an employer fails to bring himself within the terms of the act.

ILLINOIS

(L. 1911, c. 000)

"§ 23. Any willful neglect, refusal, or failure to do the things required to be done by any section, clause, or provision of this act, on the part of the person or persons herein required to do them, or any violation of any of the provisions or requirements hereof, or

Nevada

any attempt to obstruct or interfere with any court officer, member of an arbitration board herein provided for, or with the Secretary of the Bureau of Labor Statistics or his deputy, in the discharge of the duties herein imposed upon any of them, or any refusal to comply with the terms of this act, shall be deemed a misdemeanor, punishable by a fine of not less than ten dollars nor more than five hundred dollars, at the discretion of the court."

KANSAS

(L. 1911, c. 218)

"§ 3. *Reservation of penalties.* Nothing in this act shall affect the liability of the employer or employé to a fine or penalty under any other statute."

MASSACHUSETTS

(L. 1911, c. 751)

"Part IV, § 19. If any officer of the (Massachusetts Employés Insurance) Association shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury."

MICHIGAN

(L. 1912, No. 3)

Penalty for failure of employer to make reports to the Industrial Accident Board of injuries to employés. See Part III, § 17, Chapter XXIX, *post*, page 540.

NEVADA

(L. 1911, c. 183)

See Chapter I, *ante*, page 24, for penalty for failure to adopt provisions of law.

Washington

NEW HAMPSHIRE

(L. 1911, c. 000)

Failure of the employer to make reports as provided in § 12 (see Chapter XXIX, *post*, page 541), shall be subject to the provisions of § 2 of the Act. See Chapter II, *ante*, page 154.

NEW JERSEY

(L. 1911, c. 95)

The penalty for failure to adopt the compensation features of the act are that common law defenses are eliminated. See Chapter I, *ante*, page 27.

OHIO

(L. 1911, c. 000)

“§ 38. *Juries not to consider act.* No provision of this act relating to the amount of compensation shall be considered by, or called to the attention of the jury on the trial of any action to recover damages as herein provided.”

RHODE ISLAND

(L. 1912, c. 000)

No special provision in the Act on this subject.

WASHINGTON

(L. 1911, c. 74)

In case of injury because of absence of safeguard required by statute certain penalties by way of additional payments are prescribed. See § 9, reprinted in Chapter XXVII, *ante*, page 528.

In case the employer defaults in paying the assessment to the insurance fund the workman has a common-law right of action, with all common-law defenses removed. See § 8, reprinted in Chapter I, *ante*, page 35.

"§ 16. Penalty for misrepresentation as to pay roll.

Any employer who shall misrepresent to the department the amount of pay roll upon which the premium under this act is based shall be liable to the state in ten times the amount of the difference in premium paid and the amount the employer should have paid. The liability to the state under this section shall be enforced in a civil action in the name of the state. All sums collected under this section shall be paid into the accident fund."

An employer who refuses to submit his books, records and pay rolls to inspection is guilty of a misdemeanor. § 15. See Chapter XXVII, *ante*, page 529.

WISCONSIN

(L. 1911, c. 50)

The board may increase an award 25 per cent for failure to pay temporary compensation pending the determination of a controversy. §§ 2394-17. Chapter XXIV, *ante*, page 449.

CHAPTER XXIX

REPORTS OF INJURIES AND AWARDS

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CALIFORNIA

(L. 1911, c. 399; L. 1911, c. 53)

At a special session of the Legislature in 1911 an Act known as Chapter 53 of that year was passed and approved by the governor, reading as follows:

“§ 1. Every employer of labor in this State shall keep a full, true and correct record of every personal injury suffered by his or its employés, arising out of or in the course of the employment, and resulting in death, or in disability extending over a period of a week or more. Within fifteen days after the happening of any such personal injury, a written report thereof shall be mailed by the employer to the industrial accident board informally, or on blanks to be provided by said board for this purpose. The said report shall contain the name of the employer, location of place of employment, nature of employment, name, address, age, nationality, sex and occupation of the injured person, length of time the injured person had worked at the particular employment previous

to injury, date and hour of the day or night of the accident, the hour at which the injured employé began work on the date of the accident, nature of the injury, cause of the injury and rate of wages of the injured employé.

"§ 2. Upon the termination of the disability of the injured employé or at the expiration of sixty days from the date of the accident, if the disability should extend beyond such period, the employer shall mail to the industrial accident board a supplemental report in relation to such disability, informally or on blanks to be provided by said board for this purpose. Such report must contain complete statements as to any claim made by the injured employé for indemnification for the injury sustained, payment made to him or in his behalf for medical, surgical or other care, claim for compensation or damages made for such injuries and any compromise or settlement of claim for compensation or damages entered into between the employer and such injured employé, his heirs, dependents or legal representative. In the event that any payment shall be made to such injured employé, or his dependents at any time thereafter, in compromise or settlement of a claim for compensation or damages, the amount of such payment shall be forthwith reported by the employer to the industrial accident board.

"§ 3. Every physician who attends any such injured employé shall keep a record of his case. Within ten days from the date of his first attendance upon the injured employé, he shall mail to the industrial accident board a report, informally or on blanks to be provided by the said board for this purpose. The said report shall contain the name and address of the employer, name, address, sex and age of the injured

California

employé, date of accident, description of the injury, probable nature and extent of disability. Upon the termination of the disability of the injured employé or the termination of said physician's attendance upon his case, he shall forthwith mail to the industrial accident board a supplemental report in relation to such case describing the physical condition of the injured employé, his disability, convalescence or discharge from the doctor's care.

"§ 4. Every person, firm, association or corporation insuring against the liability of employers for damages or compensation for personal injury to employés or indemnifying any employer for, or on account of any such liability shall keep a record thereof, and shall within the first five days of each and every month, report in writing to the industrial accident board, informally or on blanks to be provided by said board for this purpose, every such injury to employés reported to it, every claim for damages or compensation for such injury filed with such person, firm, association or corporation and any settlement or compromise of any such claim for damages or compensation whether made with such injured employé, his heirs, dependents or legal representative.

"§ 5. Every employer, physician or insurance company, firm or association, shall furnish to the industrial accident board all further information required by it in order to constitute a substantially complete and accurate history of each injury and the damages or compensation paid therefor.

"§ 6. The record required to be kept in pursuance of the provisions of this act shall at all times be open to inspection of the industrial accident board or any member thereof, or any examiner appointed thereby. Any statement contained in such report shall not be

Illinois

admissible as evidence in any action arising out of the death or injury of any employé by reason of the accident reported.

"§ 7. It shall be unlawful for any person, firm, corporation, agent, or officer of a firm or corporation to fail, neglect or refuse to comply with any of the provisions of this act. Any person, firm, corporation, agent or officer of a firm or corporation that violates or omits to comply with any of the provisions of this act, shall be guilty of a misdemeanor for each and every offense and shall be, upon conviction thereof, punishable by fine of not less than ten dollars or more than one hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

"§ 8. Nothing in this act shall apply to employers of labor engaged in farming, dairying, agricultural or horticultural pursuits, in poultry raising or domestic service.

ILLINOIS

(L. 1911, c. 000)

"§ 19. It shall be the duty of every employer within the provisions of this Act to send to the Secretary of the State Bureau of Labor Statistics in writing an immediate report of all accidents or injuries arising out of or in the course of the employment and resulting in death; it shall also be the duty of every such employer to report between the fifteenth and the twenty-fifth of each month to the Secretary of the State Bureau of Labor Statistics all accidents or injuries for which compensation has been paid under this Act, which accidents or injuries entail a loss to the employé of more than one week's time, and in case the injury results in permanent disability, such report

Massachusetts

shall be made as soon as it is determined that such permanent disability has resulted or will result from such injury. All such reports shall state the date of the injury, including the time of day or night, the nature of the employer's business, the age, sex, conjugal condition of the injured person, the specific occupation of the injured person, the direct cause of the injury and the nature of the accident, the nature of the injury, the length of disability and, in case of death, the length of disability before death, the wages of the injured person, whether compensation has been paid to the injured person, or to his legal representative or his heirs or next of kin, the amount of compensation paid, the amount paid for physicians', surgeons' and hospital bills, and by whom paid, and the amount paid for funeral or burial expenses, if known. The making of reports as provided herein shall release the employer covered by the provisions of this Act, from making reports to any other officer of the State."

KANSAS

(L. 1911, c. 218)

"§ 16. *Reports as to accidents and compensation.* Employers affected by this act shall report annually to the state commissioner and factory inspector such reasonable particulars in regard thereto as he may require, including particulars as to all releases of liability under this act and any other law. The penalty for failure to report or for false report shall invalidate any such release of liability."

MASSACHUSETTS

(L. 1911, c. 751)

"Part III, § 18. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, re-

Michigan

ceived by his employés in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an accident resulting in personal injury, a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for the purpose. Upon the termination of the disability of the injured employé or, if such disability extends beyond a period of sixty days at the expiration of such period, the employer shall make a supplemental report on blanks to be procured from the board for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employé, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the board. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense."

MICHIGAN

(L. 1912, No. 3)

"Part III, § 17. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employés in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of his establishment or place of work, the

New Jersey

name, age, sex and occupation of the injured employé, and shall state the time, the nature and cause of the injury, and such other information as may be required by the board. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense."

NEVADA

(L. 1911, c. 183)

There are no provisions in the Nevada Law on this subject.

NEW HAMPSHIRE

(L. 1911, c. 000)

"§ 12. Every employer subject to the provisions of this act, shall from time to time make to the Commissioner of Labor such returns as to its operation as said commissioner may require upon blanks to be furnished by said commissioner. Any employer failing to make such returns when required by said commissioner shall, until such returns are made, be subject to the provisions of section 2 of this act."¹

NEW JERSEY

(L. 1911, c. 95)

Chapter 241 of the Laws of 1911. "An Act creating the Employers' Liability Commission, etc., * * *"

"2. From and after the fourth day of July next, when the said law becomes operative, every employer of labor within the state of New Jersey shall report to said commission upon the occurrence of any injury to

¹ See Chapter II, *ante*, page 154.

Ohio

any of his employés the name and nationality of the employé so injured, the nature and extent of such injury, whether said injured employé and the employer at the time of said injury were subject to the provisions of section one or section two of said act, and the amount of compensation when determined, together with such other facts relating to such injury as the commission may request. The information thus received shall be tabulated, from time to time, and the records thereof shall be the private records of the commission; they shall not be made public or open to inspection unless in the opinion of the commission the public interests shall require it and they shall not be used as evidence against any employer in any suit or action at law brought by any employé for the recovery of damages. The commission shall hold meetings, from time to time, as they may deem necessary, and shall present to each session of the Legislature a report showing the operations under the said act during the preceding year, together with any suggestions or recommendations which they may deem necessary or proper for the improvement of the said act, in order to accomplish with the greatest efficiency the purposes of the said act."

(See L. 1912, c. 156, requiring insurance companies also to make reports.)

OHIO

(L. 1911, c. 000)

"§ 9. *Furnishing information.* Every employer shall furnish the Board, upon request, all information required by it to carry out the purposes of this act. The Board or any member thereof, or any person employed by the Board for that purpose, shall have

Ohio

the right to examine under oath any employer or officer, agent or employé thereof.

“§ 10. *Blanks.* Every employer receiving from the Board any blank with directions to fill the same, shall cause the same to be properly filled out as to answer fully and correctly all questions therein propounded, and if unable to do so shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the Board within the period fixed by the Board for such return.”

“§ 39. *Reports of board.* Annually on or before the 15th day of November, such Board, under the oath of at least two of its members, shall make a report to the Governor which shall include a statement of the number of awards made by it, and a general statement of the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the disbursements from the expense fund, and the condition of its respective funds, together with any other matters which such Board deems it proper to call to the attention of the Governor, including any recommendations it may have to make.”

“Chapter—Laws of 1911

“(Senate Bill No. 61.)

“AN ACT

“To amend sections 1003 and 1004 of the general code, providing for the regulation of workshops and factories.

“*Be it enacted by the General Assembly of the State of Ohio:*

“§ 1. That sections 1003 and 1004 of the general code be amended so as to read as follows:

Ohio

"§ 1003. Every manufacturer of the state shall within three days after the happening of any accident in his establishment resulting in death, or bodily injury of such a nature that the person injured does not return to his or her employment in said establishment within two or more days after the occurrence of the accident, shall forward by mail to the chief inspector of workshops and factories a report containing the following particulars in full:

"1. Name and address of manufacturer, (person, firm or corporation).

"2. Nature of business in which manufacturer is engaged and place where accident occurred.

"3. Name, address, sex, age and kind of employment of person killed or injured and whether such person is married or single.

"4. Time of day deceased began work on day of accident, time of day accident occurred, and date of accident or death.

"5. At what employed when killed or injured, whether such person was familiar with the work at which engaged or the machinery which he was operating and whether such machinery was in good order and guarded so as to prevent accident under ordinary circumstances. If such machinery was not guarded, reasons for not guarding the same.

"6. Description of manner in which such person was killed or injured.

"7. Description of nature and extent of injury.

"8. Number of persons deprived of support in consequence of such death or injury.

"Such manufacturer shall, in all cases of death within six months after the accident, or in case the person injured returns to work in his establishment within six months after the accident, forward by mail

Rhode Island

to the chief inspector of workshops and factories within five days after such death or such return to work, or in case of no death or return to work within six months, then within five days after the expiration of such six months, a supplemental report which shall contain the following particulars in full:

"1. Name and address of manufacturer.

"2. Name, sex and age of person injured and date and place where accident occurred.

"3. A correct statement of the amount of wages paid to such person at the time of such injury and the amount of wages lost during the period between the time of such accident and the time of forwarding such supplemental report.

"4. The amount of compensation paid by such manufacturer by reason of such injury or death, the names of persons to whom such compensation was paid and a statement of reasons for paying such amounts to such persons.

"§ 1004. Whoever violates or fails to comply with any requirement of the preceding section shall be fined not less than fifty dollars, nor more than one hundred dollars for the first offense, and not less than two hundred dollars nor more than five hundred dollars for each subsequent offense.

"§ 2. That sections 1003 and 1004 of the general code of Ohio are hereby repealed.

"Approved April 8, 1911."

RHODE ISLAND

(L. 1912, c. 571)

There is no provision in the Act on this subject.

WASHINGTON

(L. 1911, c. 74)

"§ 14. *Notice of accident.* Whenever any accident occurs to any workman it shall be the duty of the employer to at once report such accident and the injury resulting therefrom to the department, and also to any local representative of the department. Such report shall state:

"1. The time, cause and nature of the accident and injuries, and the probable duration of the injury resulting therefrom.

"2. Whether the accident arose out of or in the course of the injured person's employment.

"3. Any other matters the rules and regulations of the department may prescribe."

WISCONSIN

(L. 1911, c. 50)

There does not seem to be any provision of the Act requiring accident reports but such reports are required of employers and insurance companies.

CHAPTER XXX

WHEN LAWS BECOME EFFECTIVE

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CALIFORNIA

(L. 1911, c. 399)

“§ 31. This act shall take effect and be in force on and after the first day of September, A. D. 1911.”

ILLINOIS

(L. 1911, c. 000)

“§ 25. This Act shall take effect and be in force on and after the first day of May, 1912.

“Approved by Governor, June 10th, 1911.”

KANSAS

(L. 1911, c. 218)

“§ 49. This act shall take effect and be in force from and after its publication in the statute book, and the first day of January, 1912.

“Approved by Governor, March 15, 1911.”

MASSACHUSETTS

(L. 1911, c. 751)

"Part V, § 6. Part IV ¹ of this act shall take effect on the first day of January, nineteen hundred and twelve; sections one to three inclusive of Part III shall take effect on the tenth day of May, nineteen hundred and twelve (as amended by L. 1912, c. 571); the remainder thereof shall take effect on the first day of July, nineteen hundred and twelve.

HOUSE OF REPRESENTATIVES.

July 28, 1911

Passed to be enacted.

JOSEPH WALKER,
Speaker.

In Senate, July 28, 1911.

Passed to be enacted,

ALLEN T. TREADWAY,
President.

July 28, 1911.

Approved,
EUGENE N. FOSS.

MICHIGAN

(L. 1912, No. 3)

"Part VI, § 8. The provisions of this act shall take effect and be in force from and after September first, nineteen hundred twelve."

¹ Part IV is that portion of the Act which creates The Massachusetts Employés Insurance Association. See Chapter XXVII, *ante*, page 500.

Washington

NEVADA

(L. 1911, c. 183)

“§ 15. This act shall take effect July 1, 1911.”

NEW HAMPSHIRE

(L. 1911, c. 000)

“§ 13. This act shall take effect January first, nineteen hundred and twelve.

“Approved April 15, 1911.”

NEW JERSEY

(L. 1911, c. 95)

“§ III. 27. *Effective*. This act shall take effect on the fourth day of July next succeeding its passage and approval.

“Approved April 4, 1911.”

OHIO

(L. 1911, c. 000)

In effect January 1, 1912.

RHODE ISLAND

(L. 1912, c. 000)

“Art. V, § 8. This act shall take effect on the first day of October, nineteen hundred and twelve.”

Approved by Governor, April 29, 1912.

WASHINGTON

(L. 1911, c. 74)

“Passed the House February 23, 1911.

“Passed the Senate March 7, 1911.

“Approved by the Governor March 14, 1911.”

WISCONSIN

(L. 1911, c. 50)

"§ 2394-32 * * * (2.) Sections 2394-3 to 2394-32, inclusive, shall take effect and be in force from and after the passage and publication of this act, and the entire act shall be in force from and after September 1st, 1911.

"Senate: Ayes, 22; Noes, 3; Paired, 2.

"Assembly: Ayes, 69; Noes, 13; Paired, 2.

"Approved May 3, 1911."

CHAPTER XXXI

FEES AND COSTS ¹

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Under the British Columbia Act it is held that the Supreme Court has jurisdiction to deal with the question of costs. *Darnley v. Canadian Pacific Railway Company* (1909), 15 Br. C. R. 324; 4 B. W. C. C. 449. An injured workman brought an action against his employers at common law and under the Employers' Liability Act, asking in the alternative for the assessment of compensation under the Workmen's Compensation Act. The employers filed an admission of liability under the latter Act, and made an offer of compensation at the rate of \$10 per week. The action failed, and compensation was assessed at \$9.00 per week. It was held that the judge has a discretion as to the costs, and in this case the workman should have the costs of the assessment of compensation under the Workmen's Compensation Act. *Wilson v. Kelly and Others* (1909), (Supreme Court of British Columbia) 14 B. C. 437; 3 B. W. C. C. 599.

Where an employer succeeded on an application to terminate an award costs were allowed to the employer;

¹ For attorneys' fees, see Chapter XIX, *ante*, page 346.

Massachusetts

it was held that in awarding these costs it was immaterial that the proceedings on behalf of the employer were conducted by an insurance company which had issued a liability policy to the employer. *Cornish v. Lynch* (1910), 3 B. W. C. C. 343.

CALIFORNIA

(L. 1911, c. 399)

"§ 21. No fees shall be charged by the clerk of any court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceedings to review an award, costs as between the parties shall be allowed or not in the discretion of the court."

ILLINOIS

(L. 1911, c. 000)

Presumably only usual to court proceedings as there is no special provision of the act relating to the subject.

KANSAS

(L. 1911, c. 218)

For arbitrators' fees and costs of arbitration see § 26, in Chapter XXIV, *ante*, page 413.

For attorney's fees and lien see §§ 15 and 38, in Chapter XIX, *ante*, page 346.

MASSACHUSETTS

(L. 1911, c. 751)

"Part III, § 13. Fee of attorneys and physicians for services under this act shall be subject to the approval of the industrial accident board.

New Hampshire

Fees of arbitrators are paid by the Association which can deduct one-third thereof from the award found due to the employé. Part III, § 9. See Chapter XXIV, *ante*, page 421

“Part III, § 14. If the committee of arbitration, industrial accident board, or any court before whom any proceedings are brought under this act determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, it shall assess the whole cost of the proceedings upon the party who has so brought, prosecuted or defended them.”

MICHIGAN

(L. 1912, No. 3)

See Part III, § 3, Chapter XXIV, *ante*, page 423.

NEVADA

(L. 1911, c. 183)

Compensation in Nevada is enforced by action in court and “costs of suit and reasonable attorney’s fees” are allowed as in other actions. § 9. See Chapter XXIV, *ante*, page 427. •

NEW HAMPSHIRE

(L. 1911, c. 000)

In proceedings in Court to determine the compensation the court may award such “taxable costs as justice may require.” § 9. See Chapter XXIV, *ante*, page 427.

Washington

NEW JERSEY

(L. 1911, c. 95)

For attorney's fees see Chapter XIX, *ante*, page 348.

The costs of proceedings in court when disputes arise are fixed by the judge presiding. § II, paragraph 20. See Chapter XXIV, *ante*, page 429.

OHIO

(L. 1911, c. 000)

On an appeal to a court from an award "The costs of such proceeding, including a reasonable attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party." § 36.

RHODE ISLAND

(L. 1912, c. 000)

"Art. III, § 6. * * * The Superior Court may award as costs the actual expenditures, or such part thereof as to the court shall seem meet, but not including counsel fees, and shall include such costs in its decree. The Superior Court may refuse to award costs, and no costs shall be awarded against an infant or person under disability or against a guardian *ad litem*."

WASHINGTON

(L. 1911, c. 74)

In case of an appeal from an award "if the decision of the department shall be reversed or modified, such (attorney's) fee and the fees of medical and other witnesses and the costs shall be payable out of the ad-

Wisconsin

ministration fund, if the accident fund is affected by the litigation," § 20. See Chapter XXV, *ante*, page 464.

For fees of medical witnesses in appeal cases see § 25, in Chapter XXV., *ante*, page 465.

WISCONSIN

(L. 1911, c. 50)

"§§ 2394-22. No fees shall be charged by the clerk of any court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies of transcripts thereof. In proceedings to review an award, costs as between the parties shall be allowed or not in the discretion of the court, but no costs shall be taxed against said board. In any action for the review of an award, and upon any appeal therein to the supreme court, it shall be the duty of the attorney general, personally, or by an assistant, to appear on behalf of the board, whether any other party defendant shall have appeared or be represented in the action or not."

CHAPTER XXXII

PREFERENCES OF CLAIMS AND AWARDS FOR COMPENSATION

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CALIFORNIA

(L. 1911, c. 399)

“§ 23. A claim for compensation for the injury or death of any employé, or any award or judgment entered thereon, shall be entitled to a preference over the other debts of the employer if and to the same extent as the wages of such employé shall be so preferred; but this section shall not impair the lien of any judgment entered upon any award.”

ILLINOIS

(L. 1911, c. 000)

“§ 11. Any person entitled to payment under the compensation provisions of this act from any employer shall have the same preferential claim therefor against the property of the employer as is now allowed by law for a claim by such person against such employer for unpaid wages or for personal services, such preference to prevail against wage claims of all other employés, not entitled to compensation for injuries.”

Nevada

KANSAS

(L. 1911, c. 218)

There is no provision in the Kansas Act on this subject.

MASSACHUSETTS

(L. 1911, c. 751)

There is no provision on this subject in the Massachusetts Act as awards for compensation are paid by the association. When the employer is insured in a liability insurance company the company is subject to all the provisions of the act or to supervision, etc. (Part V, § 3) therefore the amount is secured. In case an employé sues under the common law for damages there is no preference under this act.

MICHIGAN

(L. 1912, No. 3)

"Part II, § 21. * * * In case of insolvency every liability for compensation under this act shall constitute a first lien upon all the property of the employer liable therefor, paramount to all other claims or liens except for wages and taxes, and such liens shall be enforced by order of the court."

NEVADA

(L. 1911, c. 183)

"§ 12. A claim for compensation for the injury or death of any employé or any reward or judgment entered thereon shall be entitled to a preference over the

Rhode Island

other debts of the employer if and to the same extent as the wages of such employé shall be so preferred, but this section shall not impair the lien of any judgment entered upon any award."

NEW HAMPSHIRE

(L. 1911, c. 000)

"§ 10. Any person entitled to weekly payments under this act against any employer shall have the same preferential claim therefor against the assets of the employer as allowed by law for a claim by such person against such employer for unpaid wages or personal services."

NEW JERSEY

(L. 1911, c. 95)

"§ III, 22. *Compensation a preferential lien. Claims not assignable.* The right of compensation granted by this act shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor."

OHIO

(L. 1911, c. 000)

There is no provision on this subject in the Ohio Act.

RHODE ISLAND

(L. 1912, c. 000)

"Art. II, § 24. *Claims preferred.* The claim for compensation under this act, or under any alternative scheme permitted by Article IV of this act, and any

Wisconsin

decree on any such claim, shall be entitled to a preference over the unsecured debts of the employer hereafter contracted to the same amount as the wages of labor are now preferred by the laws of this state; but nothing herein shall be construed as impairing any lien which the employé may have acquired."

Article IV provides for an alternative scheme. See Chapter XXVII.

WASHINGTON

(L. 1911, c. 74)

There is no provision in the Washington Act on this subject.

WISCONSIN

(L. 1911, c. 50)

"§ 2394-24. The whole claim for compensation for the injury or death of any employé or any award or judgment thereon, shall be entitled to a preference over the unsecured debts of the employer hereafter contracted, but this section shall not impair the lien of any judgment entered upon any award."

CHAPTER XXXIII

ENFORCEMENT BY WORKMEN OF CLAIMS FOR COMPENSATION DIRECTLY AGAINST LIABILITY INSURANCE COMPANIES

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Under the British Columbia Compensation Act it was held that a workman could not recover from a liability insurance company which had issued a policy to his employer who subsequently became insolvent. *Disourdi v. Sullivan Group Mining Co. and Another* (1910), 15 B. C. R. 305; 4 B. W. C. C. 462.

An injured workman was paid compensation by a company which became insolvent and was wound up. The company was insured against accidents under the Act and on the company ceasing to pay compensation the workman brought proceedings against the insurers. The insurers alleged that there was a dispute between them and the workman's employers as to whether the latter had taken precautions against accidents, as required by the policy, and that until this dispute had been settled by arbitration, in accordance with the terms of the policy, the employers could not claim against them and that the workman had no greater rights than his employers had. The contention of the

California

insurers was upheld by the County Court judge and this decision was affirmed by the Court of Appeal. *King v. Phœnix Assurance Co.* (1910), 3 B. W. C. C. 442.

There must be an admission of liability on the part of the insurer, or a finding by a competent tribunal, before the provisions of § 6 of the British Columbia Workmen's Compensation Act of 1902, as to the payment into court, can be invoked. *Disourdi v. Sullivan Group Mining Company and Maryland Casualty Co.* (No. 2) (1909), 14 B. C. R. 256; 2 B. W. C. C. 508. In the Supreme Court of British Columbia it was held that any right which the applicant for compensation might have against the employers under § 6 of the British Columbia Compensation Act must be decided in an action commenced in the ordinary way and that the rules made under § 6 were *ultra vires*. *Disourdi v. Sullivan Group Mining Co. and Maryland Casualty Co.* (No. 3), 14 B. C. R. 273; 2 B. W. C. C. 514.

CALIFORNIA

(L. 1911, c. 399)

“§ 24. Nothing in this act shall affect the organization of any mutual or other insurance company, or any existing contract for insurance or employer's liability, nor the right of the employer to insure in mutual or other companies, in whole or in part, against such liability, or against the liability for the compensation provided for by this act, or to provide by mutual or other insurance, or by arrangement with his employés, or otherwise, for the payment to such employés, their families, dependents, or representatives, of sick, accident or death benefits, in addition to the

Kansas

compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contributions, or other benefit whatsoever due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer, and in addition thereto, the right to enforce in his own name, in the manner provided in this act, the liability of any insurance company which may, in whole or in part, have insured the liability for such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance company, shall, to the extent thereof, be a bar to recovery against the other of the amount so paid, and provided further, that as between the employer and the insurance company, payment by either directly to the employé, or to the person entitled to compensation, shall be subject to the conditions of the insurance contract between them."

ILLINOIS

(L. 1911, c. 000)

No provision in Act on this subject.

KANSAS

(L. 1911, c. 218)

"§ 34. *Insurance.* Where the payment of compensation to the workman is insured, by a policy or policies, at the expense of the employer, the insurer shall be subrogated to the rights and duties under this act of the employer, so far as appropriate."

"§ 30. *Staying proceedings upon agreement or award.* At any time after the filing of an agreement or award

Michigan

and before judgment has been granted thereon, the employer may stay proceedings thereon by filing in the office of the clerk of the district court wherein such agreements or award is filed: (a) A proper certificate of a qualified insurance company that the amount of the compensation to the workman is insured by it: (b) A proper bond undertaking to secure the payment of the compensation. Such certificate or bond shall first be approved by a judge of the said district court.

MASSACHUSETTS

(L. 1911, c. 751)

"Part V, § 3. Any liability insurance company authorized to do business within this Commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by Part II of this act, and when such liability company issues a policy conditioned to pay such compensation the holder of such policy shall be regarded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to the provisions of Parts I, II, III and V and of section twenty-two of Part IV of this act, and shall file with the Insurance Department its classifications of risks and premiums relating thereto and any subsequent proposed classifications or premiums, none of which shall take effect until the Insurance Commissioner has approved the same as adequate for the risks to which they respectively apply." (As amended by L. 1912, c. 571.)

MICHIGAN

(L. 1912, No. 3)

There is no provision on this subject in the Michigan Act.

Ohio

NEVADA

(L. 1911, c. 183)

There is no provision on this subject in the Nevada law.

NEW HAMPSHIRE

(L. 1911, c. 000)

Any employer to take advantage of the provisions of the Act, must either satisfy the Commissioner of Labor that he is of sufficient financial ability to comply with the act, or must file a bond "in such form and amount as the commissioner may prescribe." This bond may be enforced by the Commissioner of Labor, "for the benefit of all persons to whom such employer may become liable under this Act in the same manner as probate bonds are enforced." § 3. See Chapter II, *ante*, page 155.

NEW JERSEY

(L. 1911, c. 95)

There is no provision in the New Jersey Act permitting a workman to enforce his claim directly against an insurance company which insures his employer.

OHIO

(L. 1911, c. 000)

There is no provision on this subject in the Ohio Act. In fact in Ohio no insurance company can write compensation insurance, because no employer can adopt the compensation feature of the statute except by paying premiums into the state insurance fund.

Wisconsin

RHODE ISLAND

(L. 1912, c. 571)

There is no provision in the Act on this subject.

WASHINGTON

(L. 1911, c. 74)

There is no provision in the Washington Act on this subject. In fact the only way in which an employer can adopt the compensation feature of the statute is to pay premiums into the state insurance fund.

WISCONSIN

(L. 1911, c. 50)

“§ 2394-26. Nothing in this act shall affect the organization of any mutual or other insurance company, or any existing contract for insurance of employers' liability, nor the right of the employer to insure in mutual or other companies, in whole or in part, against such liability, or against the liability for the compensation provided for by this act, or to provide by mutual or other insurance, or by arrangement with his employés, or otherwise, for the payment to such employés, their families, dependents, or representatives, of sick, accident, or death benefits in addition to the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contribution, or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right

to enforce in his own name, in the manner provided in this act, the liability of any insurance company which may, in whole or in part, have insured the liability for such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance company, shall, to the extent thereof, be a bar to recovery against the other of the amount so paid, and provided further, that as between the employer and the insurance company, payment by either directly to the employé, or to the person entitled to compensation, shall be subject to the conditions of the insurance contract between them."

CHAPTER XXXIV

INSURANCE CONTRACTS PRESUMED TO BE SUBJECT TO ACT

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CALIFORNIA

(L. 1911, c. 399)

“§ 25. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract of insurance unless such company shall have been approved by the commissioner of insurance, as provided by law.”

ILLINOIS

(L. 1911, c. 000)

“§ 15. This Act shall not affect or disturb the continuance of any existing insurance, mutual aid, benefit or relief association or department, whether maintained in whole or in part by the employer or whether maintained by the employés, the payment of benefits of such association or department being guaranteed by the employer or by some person, firm or corporation for him: Provided, the employer con-

Kansas

tributes to such association or department an amount sufficient to insure the employés or other beneficiary the full compensation herein provided, exclusive of the cost of the maintenance of such association or department without any expense to the employé. This Act shall not prevent the organization and maintaining under the insurance law of this State of any benefit or insurance company for the purpose of insuring against the compensation provided for in this Act, the expense of which is maintained by the employer. This Act shall not prevent the organization or maintaining under the insurance laws of this State of any voluntary mutual aid, benefit or relief association among employés for the payment of additional accident or sick benefits.

"No existing insurance, mutual aid, benefit or relief association or department shall, by reason of anything herein contained, be authorized to discontinue its operation without first discharging its obligations to any and all persons carrying insurance in the same or entitled to relief or benefits therein.

"Any contract of employment, relief benefit, or insurance or other device whereby the employé is required to pay any premium or premiums for insurance against the compensation provided for in this Act shall be null and void, and any employer withholding from the wages of any employé any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine of not less than ten dollars nor more than twenty-five dollars in each offense in the discretion of the court."

KANSAS

(L. 1911, c. 218)

See § 34, in Chapter XXXIII, *ante*, page 562.

Ohio

MASSACHUSETTS

(L. 1911, c. 751)

See Part V, § 3, in Chapter XXXIII, *ante*, page 563.

MICHIGAN

(L. 1912, No. 3)

Every contract of insurance against liability for compensation is deemed made subject to the provisions of the Act. See Part IV, § 3, Chapter XXVII, *ante*, page 507.

NEVADA

(L. 1911, c. 183)

There is no provision on this subject in the Nevada law.

NEW HAMPSHIRE

(L. 1911, c. 000)

There is no provision on this subject in the New Hampshire Act.

NEW JERSEY

(L. 1911, c. 95)

There is no provision in the New Jersey Act on this subject.

OHIO

(L. 1911, c. 000)

There is no provision on this subject in the Ohio Act. In fact no insurance company can insure an employer against liability under the compensation

Wisconsin

feature of the statute, as the only method in which an employer can adopt this feature is by contributing to the state insurance fund.

RHODE ISLAND

(L. 1912, c. 571)

There is no provision in the Act on this subject.

WASHINGTON

(L. 1911, c. 74)

There is no provision in the Washington Act on this subject. In fact the only method in which an employer can adopt the compensation feature of the statute is by paying premiums into the state insurance fund.

WISCONSIN

(L. 1911, c. 50)

“§ 2394-27. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract of insurance unless such company shall have been approved by the commissioner of insurance, as provided by law. For the purposes of this act, each employé shall constitute a separate risk within the meaning of section 1898d of the statutes.”

CHAPTER XXXV

COMPROMISING CLAIMS AND AWARDS¹

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In general.

A workman employed by contractors was knocked down and injured by the defendants' tramcar. He received several weekly payments from his employers and gave them receipts therefor. Subsequently he repaid to the employers the amount he had received from them, and sued the defendants for damages. At the trial the workman stated that he did not understand the nature and terms of the receipts he had signed. The County Court judge dismissed the case, holding, as a matter of law, that he had recovered compensation within the meaning of § 6 of the Workmen's Compensation Act, and that his action was therefore barred. The Court of Appeal held that it was a question for the jury whether the plaintiff understood the nature and effect of the receipts he had signed. *Huckle v. The London County Council* (1910), 4 B. W. C. C. 113.

An illiterate and ignorant workman gave a cumula-

¹ For commutation of awards and agreed compensation see Chapter XI, *ante*, page 294.

In general

tive receipt for all payments of compensation received by him. This sum included one week in advance, but no other additional payment. It was found, as a fact, that the workman was not recovered at this date, nor at the date of the hearing of the arbitration. The employer applied to record a memorandum of agreement of final discharge, and the workman at the same time applied to record one to pay him compensation. It was held that the "final discharge" was not a genuine agreement, and should not be recorded, but that the workman's memorandum should be recorded. *Macandrew v. Gilhooley* (1911), 48 Scotch L. R. 511; 4 B. W. C. C. 370.

A judge refused to record a memorandum of agreement for a lump sum settlement on the ground of inadequacy. The workman then applied for compensation, and the judge, finding that his incapacity was no longer due to the accident and that the amount in fact paid under the settlement was enough to cover all compensation due for the short period during which the incapacity had been due to the accident, decided in favor of the employers. The Court of Appeal held that the judge was entitled to decide the application for compensation freely on the evidence and was not bound by his previous decision to award compensation. *Beech v. Bradford Corporation* (1911), 4 B. W. C. C. 236.

A workman entitled to compensation under the Workmen's Compensation Act of 1906 signed a discharge which purported to be in full satisfaction of all claims, past and future, in the belief that he was merely signing a receipt for compensation past due. The employers' cashier took the discharge in the belief that the workman had fully recovered, whereas he was st

In general

totally incapacitated. Compensation was awarded, it being held that the workman was not barred from recovering compensation by the discharge. *Ellis v. The Lochgelly Iron and Coal Co.* (1909), 46 Scotch L. R. 960; 2 B. W. C. C. 136.

Where a claimant signed a release expressing a consideration of £35 and it appeared only the sum of £17, 10s. was paid, and the balance was paid as wages, it was held that there was accord but no satisfaction, and that the receipt did not contain a genuine agreement under the Act. *Hawkes v. Richard Coles and Sons* (1910), 3 B. W. C. C. 163.

A compensation agreement between the workman and his employers stated that the workman should receive a lump sum of money and be given regular employment, as foreman in the works, at specified wages. The employers paid the sum of money and kept the workman in their employment on the terms arranged for nearly three years, when they dismissed him owing to a dispute. The workman thereupon brought an action against them for damages for breach of contract, and it was held that the action could not be maintained as there was no breach of contract, the employers having given the workman regular employment for a considerable period. *Lawrie v. James Brown & Co.* (1908), 45 Scotch L. R. 477; 1 B. W. C. C. 137.

A seaman sustained serious injuries. He was conveyed to a hospital while unconscious and remained there after his discharge from the ship for fifteen weeks. The shipowners made payments for his maintenance during that period equal to the full weekly compensation for which they were liable. They were not legally liable to make these payments under the Merchant

California

Shipping Act. It was held that such payments were a benefit which the workman received from the employers during the period of his incapacity, and that they must be taken into account in fixing the amount of compensation. *Kempson v. Owners of Schooner "Moss Rose"* (1910), 4 B. W. C. C. 101.

On an application for compensation account must be taken of a lump sum paid by the employer in full settlement. *Horsman v. Glasgow Navigation Co.* (1909), 3 B. W. C. C. 27.

CALIFORNIA

(L. 1911, c. 399)

"§ 28. Nothing in this act contained shall be construed as impairing the right of parties interested, after the injury or death of an employé, to compromise and settle upon such terms as they may agree upon, any liability which may be claimed to exist under this act on account of such injury or death, nor as conferring upon the dependents of any injured employé any interest which he may not divert by such settlement or for which he or his estate shall, in the event of such settlement by him, be accountable to such dependents or any of them."

ILLINOIS

(L. 1911, c. 000)

"§ 12. Any contract or agreement made by any employer or his agent or attorney with any employé or any other beneficiary of any claim under the provisions of this Act within seven days after the injury shall be presumed to be fraudulent.

"§ 13. No employé or beneficiary shall have power

Michigan

to waive any of the provisions of this Act in regard to the amount of compensation which may be payable to such employé or beneficiary hereunder."

KANSAS

(L. 1911, c. 218)

"§ 23. *Agreements.* Compensation due under this act may be settled by agreement. Every such agreement, other than a release, shall be in the form hereinafter provided."

But see §§ 29 and 32, in Chapter XXVI, *ante*, page 487, for right to cancel or modify agreements or awards.

MASSACHUSETTS

(L. 1911, c. 751)

The agreement as to compensation must be filed with and approved by the Industrial Accident Board. Part III, § 4. See Chapter XXIV, *ante*, page 419.

"Part II, § 22. Whenever any weekly payment has been continued for not less than six months, the liability therefor may in unusual cases be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the Industrial Accident Board."

MICHIGAN

(L. 1912, No. 3)

"PART VI**"MISCELLANEOUS PROVISIONS**

"§ 1. If the employé, or his dependents, in case of his death, of any employer subject to the provisions

New Hampshire

of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury."

NEVADA

(L. 1911, c. 183)

"§ 14. Nothing in this act contained shall be construed as impairing the right of parties interested after the injury or death of an employé to compromise or settle upon such terms as they may agree upon any liability which may be claimed to exist under this act on account of such injury or death, nor as conferring upon the dependents of any injured employé any interest which he may not divert by such settlement or for which he or his estate shall in the event of such settlement by him be accountable to such dependents or any of them."

NEW HAMPSHIRE

(L. 1911, c. 000)

There is no prohibition against compromising claims in the New Hampshire Act. Nor is there any power of revision vested in any person when an employer and his employé agree upon a basis of compensation. In fact the statute plainly contemplates such agreements and provides a remedy only when an agreement is not reached. See § 9, in Chapter XXIV, *ante*, page 427.

Washington

NEW JERSEY

(L. 1911, c. 95)

No compensation payment can be commuted by payment of a lump sum unless by order of a judge of the Court of Common Pleas "in the interest of justice."

§ 2, paragraph 21. See Chapter XI, *ante*, page 299.

There has been much discussion as to whether a general release taken by an employer in consideration of the payment of a lump sum to an injured workman is binding under the subdivision of the Act referred to above. Doubtless such releases are not void, but they may be voidable if it appears that an injustice has been done to the employé.

OHIO

(L. 1911, c. 000)

There is no provision on this subject in the Ohio Act.

RHODE ISLAND

(L. 1912, c. 571)

The parties may agree upon the compensation to be paid. Art. III, § 1. See Chapter XXIV, *ante*, page 438.

WASHINGTON

(L. 1911, c. 74)

There is no provision in the Washington Act on this subject.

WISCONSIN

(L. 1911, c. 50)

The employer may compromise claims under the Act, but every compromise is subject to review by the industrial accident board and may be set aside, modified or confirmed within one year from the time of such compromise. See § 2394-15, Chapter XXIV, *ante*, page 448.

CHAPTER XXXVI

EXPENSES OF ADMINISTERING LAW, OTHER THAN PAYMENTS OF AWARDS FOR COMPENSATION

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CALIFORNIA

(L. 1911, c. 399)

“§ 29. The sum of fifty thousand dollars is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, to be used by the industrial accident board in carrying out the purposes of this act, and the controller is hereby directed to draw his warrant on the general fund from time to time in favor of said industrial accident board for the amounts expended under its direction, and the treasurer is hereby authorized and directed to pay the same.”

ILLINOIS

(L. 1911, c. 000)

There is no special provision in the Act on this subject.

KANSAS

(L. 1911, c. 218)

The arbitrator's fees are paid by the parties. § 26.
See Chapter XXIV, *ante*, page 413.

Michigan

The regular courts, where controversies are determined in lieu of arbitration, are, of course, maintained at the expense of the State.

MASSACHUSETTS

(L. 1911, c. 751)

All expense of administering the law is paid by the State by direct appropriations. See Chapter XXIV, *ante*, page 418. Except, of course, the expenses of the Massachusetts Employés Insurance Association which are paid by that association from its own funds. Part IV, §§ 14, 15 and 16. The first board of directors of the association may spend \$15,000 appropriated by the State. Part IV, § 24.

MICHIGAN

(L. 1912, No. 3)

The expenses of administering the law are a state charge. See Part IV, Chapter XXVII, *ante*, page 505.

“Part VI, § 7. To carry out the provisions of this act there is hereby appropriated for the expenses of the industrial accident board for the fiscal year ending June thirtieth, nineteen hundred thirteen, and annually thereafter, the sum of twenty-five thousand dollars. The auditor general shall add to and incorporate into the state tax the sum of twenty-five thousand dollars annually, which said sum shall be included in the state taxes apportioned by the auditor general on all taxable property of the state, to be levied, assessed and collected as other state taxes, and when so assessed and collected to be paid into the general fund to reimburse said fund for the appropriation made by this act.”

Ohio

NEVADA

(L. 1911, c. 183)

The Nevada law is enforced in the regular courts and therefore there is no special provision for administration expenses.

NEW HAMPSHIRE

(L. 1911, c. 000)

The Commissioner of Labor, who has general supervision of the administration of the Act, is a state officer and is paid as such. Controversies are settled in the regular courts so there are no special expenses of administration other than the increase caused by the excess of work due to the operation of the Act.

NEW JERSEY

(L. 1911, c. 95)

See Chapter 241 of the Laws of 1911, reprinted in Chapter XXIV of this work, *ante*, page 431, creating an employers' liability commission to gather data and study the operation of the Act, at the expense of the State.

As disputes relating to compensation are determined by the Court of Common Pleas there is no special provision for paying the expenses of administering the Act. See Chapter XXIV, *ante*, page 428.

OHIO

(L. 1911, c. 000)

The State Insurance Law of Ohio is administered at the expense of the State. No part of the sum col-

Rhode Island

lected from employers to create an insurance fund is used for the purposes of administration. See §§ 1-15, reprinted in Chapter XXIV, *ante*, page 432.

“§ 37. *Expenditures of board.* The Board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in section 17. The salaries and compensation of the secretary, and all actuaries, accountants, inspectors, examiners, experts, clerks and other assistants, and all other expenses of the board herein authorized, including the premium to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers, signed by two of the members of such Board, presented to the auditor of state, who shall issue his warrant therefor as in other cases.”

“§ 40. *Expenses—preliminary.* The expense of such Board in carrying out the provisions of this act shall be paid until January 1, 1912, out of the general revenue of the State not otherwise appropriated. Such expense shall not exceed twenty-five thousand dollars in addition to the salaries of members of such board.

“§ 41. *Expenses from fund.* The expenses of such Board in carrying out the provisions of this act shall be paid from January 1st, 1912, to January 1st, 1913, out of the general revenue fund of the State not otherwise appropriated. Such expense shall not exceed one hundred thousand dollars in addition to the salary of the members.”

RHODE ISLAND

(L. 1912, c. 000)

The law is administered by the courts.

Wisconsin

WASHINGTON

(L. 1911, c. 74)

"§ 29. *Appropriations.*

"There is hereby appropriated out of the state treasury the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, to be known as the administration fund, out of which the salaries, traveling and office expenses of the department shall be paid, and also all other expenses of the administration of the accident fund; and there is hereby appropriated out of the accident fund for the purpose to which said fund is applicable the sum of \$1,500,000.00, or so much thereof as shall be necessary for the purposes of this act."

WISCONSIN

(L. 1911, c. 50)

The salaries and other expenses of the Industrial Accident Board are paid out of the general funds of the State. See § 2394-14, Chapter XXIV, *ante*, page 447

"§ 2394-30. A sum sufficient to carry out the provisions of this act is hereby appropriated out of any money in the treasury not otherwise appropriated.

CHAPTER XXXVII

REPEALING ACTS

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CALIFORNIA

(L. 1911, c: 399)

“§ 30. All acts or parts of acts inconsistent with this act are hereby repealed.”

For provision as to election of remedies see Chapter I, *ante*, page 9.

ILLINOIS

(L. 1911, c. 000)

“§ 23½. The right of action for damages caused by any such injury, at common law or any other statute in force prior to the taking of effect hereof shall not be affected by this Act and every existing right of action for negligence or to recover damages for injury resulting in death, is continued and nothing in this Act shall be construed as limiting the right of such action so construed before the taking effect of this Act.

“§ 24. The invalidity of any portion of this Act

Massachusetts

shall in no way affect the validity of any other portion thereof which can be given effect without such invalid part."

KANSAS

(L. 1911, c. 218)

"§ 48. Nothing in this act shall be construed to amend or repeal section 6999 of the General Statutes of Kansas of 1909, or House bill No. 240 of the Session of 1911, the same being 'An act relating to the liability of common carriers by railroads to their employés in certain cases, and repealing all acts and parts of acts so far as the same are in conflict herewith.'

MASSACHUSETTS

(L. 1911, c. 751)

"PART V

"MISCELLANEOUS PROVISIONS

"§ 1. If an employé of a subscriber files any claim with or accepts any payment from the association on account of personal injury, or makes any agreement, or submits any question to arbitration, under this act, such action shall constitute a release to the subscriber of all claims or demands at law, if any, arising from the injury."

"§ 4. Sections one hundred and thirty-six to one hundred and thirty-nine, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine are hereby repealed." (As amended by L. 1912, c. 571.)

New Jersey

MICHIGAN

(L. 1912, No. 3)

"Part VI, § 3. This act shall not affect any cause of action existing or pending before it went into effect."

* * * * *

"§ 5. All acts or parts of acts inconsistent with this act are to be deemed replaced by this act, and to that end are hereby repealed.

"§ 6. The legislature intends that part five of this act shall be deemed separate from the other parts thereof, so that if said part five should fail or be adjudged invalid or unconstitutional it shall in no way affect any other part of this act."

Approved March 20, 1912.

NEVADA

There is no special repealing clause in the Nevada Law.

NEW HAMPSHIRE

See § 4, in Chapter I, *ante*, page 27.

NEW JERSEY

(L. 1911, c. 95)

"§ III, 24. *As to constitutionality of any provision. Relation of sections of act.* In case for any reason any paragraph or any provision of this act shall be questioned in any court and shall be held to be unconstitutional or invalid, the same shall not be held to affect any other paragraph or provision of this act, except

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that sections I and II are hereby declared to be inseparable, and if either section be declared void or inoperative in an essential part, so that the whole of such section must fall, the other section shall fall with it and not stand alone. Section I of this act shall not apply in cases where section II becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be in extension of the common law."

"25. *Rights of action in previous cases.* Every right of action for negligence, or to recover damages for injuries resulting in death, existing before this act shall take effect, is continued, and nothing in this act contained shall be construed as affecting any such right of action nor shall the failure to give the notice provided for in Section II, paragraph fifteen of this act, be a bar to the maintenance of a suit upon any right or action existing before this act shall take effect."

The foregoing paragraph (25) seems hardly consistent with the provisions of Section II, paragraph eight, which will be found in Chapter II, *ante*, page 157. The two provisions have been the subject of much discussion. While the point is as yet undetermined by final authority, the better opinion seems to be that if the employer has brought himself within the provisions of the Compensation Act either by presumption or affirmative action under an agreement, that then the employé's common-law right of action is eliminated. For further discussion of this point see Chapter I, *ante*, page 29.

"§ 3-26. *Repealer.* All acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

OHIO

(L. 1911, c. 000)

Section 21-1 abolishes the common-law defenses of the employer who does not elect to accept the state insurance plan and then the statute continues as follows:

“§ 21-2. *Willful act of employer.* But where a personal injury is suffered by an employé, or when death results to an employé from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the willful act of such employer or any of such employer's officers or agents or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life, or safety of employés, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employé, or his legal representative, in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to any employé, or to his legal representative, in case death results except as provided in this act.

Every employé, or legal representative, in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employé or his legal representative, in case death results, who exercises his option to

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institute proceedings in court as provided in § 21-2, waives his right to any award; except as provided in Section 36 of this act.

See Chapter I, *ante*, page 32, for comments on the above section.

RHODE ISLAND

(L. 1912, c. 000)

“Art. V, § 2. Nothing in this act shall affect the liability of the employer to a fine or penalty under any other statute.

“§ 3. The provisions of this act shall not apply to injuries sustained, or accidents which occur, prior to the taking effect hereof.

“§ 4. If any section of this act shall be declared unconstitutional or invalid, such unconstitutionality or invalidity shall in no way affect the validity of any other portion thereof which can be given reasonable effect without the part so declared unconstitutional or invalid.

“§ 5. In all cases where an employer and employé shall have elected to become subject to the provisions of this act, the provisions of section 14 of Chapter 283 of the General Laws shall not apply while this act is in effect.

“§ 6. All acts and parts of acts inconsistent herewith are hereby repealed.

“§ 7. This act may be cited as ‘Workmen’s Compensation Act.’ ”

WASHINGTON

(L. 1911, c. 74)

“§ 30. *Safeguard regulations preserved.* Nothing in this act contained shall repeal any existing law pro-

viding for the installation or maintenance of any device, means or method for the prevention of accidents in extra hazardous work or for a penalty or punishment for failure to install or maintain any such protective device, means or method, but sections 8, 9, and 10 of the act approved March 6, 1905, entitled: "An act providing for the protection and health of employes in factories, mills or workshops, where machinery is used, and providing for suits to recover damages sustained by the violation thereof, and prescribing a punishment for the violation thereof and repealing an act entitled 'An act providing for the protection of employes in factories, mills, or workshops where machinery is used, and providing for the punishment of the violation thereof, approved March 6, 1903,' and repealing all other acts or parts of acts in conflict herewith," are hereby repealed, except as to any cause of action which shall have accrued thereunder prior to October 1, 1911.

"§ 31. *Distribution of funds in case of repeal.* If this act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be provided by the legislature, and in default of such legislative provision distribution thereof shall be in accordance with the justice of the matter, due regard being had to obligations of compensation incurred and existing.

"§ 32. *Saving clause.* This act shall not affect any action pending or cause of action existing on the 30th day of September, 1911."

If the employer fails to pay the assessment into the insurance the workman may sue for damages at common law with all common-law defenses eliminated. See § 8, reprinted in Chapter I, *ante*, page 34.

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WISCONSIN

(L. 1911, c. 50)

“§ 2394–31. All acts or parts of acts inconsistent with this act are to be deemed replaced by this act, and to that end are hereby repealed.”

For powers of election to demand damages or compensation see Chapter I, *ante*, page 38.

CHAPTER XXXVIII

CONSTITUTIONAL DECISIONS ON THE COMPENSATION ACTS

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EARL IVES *v.* SOUTH BUFFALO RAILWAY COMPANY ¹

(201 N. Y. 271, rev'g 140 App. Div. 921)

Workmen's compensation law; abolition of common-law defenses; constitutional law; taking property of employer without due process of law

1. Statutory modification of the "fellow-servant" rule and the law of "contributory negligence" are clearly within

¹ This case has had a profound effect upon subsequent legislation relating to the workmen's compensation principle. As it was held that a mandatory law was unconstitutional the legislatures of the other States have passed "optional," or "elective" statutes in every instance, except in the State of Washington. These other laws provide that employers and employ  s may adopt the compensation principle, or not, as they choose. Then they have en-

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the legislative power. These doctrines, for they are nothing more, may be regulated or even abolished. This is true to a limited extent as to the assumption of risk by the employé. In the Labor Law and the Employers' Liability Act, which define the risks assumed by the employé, there are many provisions which cast upon the employer a great variety of duties and burdens unknown to the common law. These can doubtless be still further multiplied and extended to the point where they deprive the employer of the rights guaranteed by our constitutions and there they must stop.

2. Classification for purposes of taxation or regulation under the police power, is a legislative function with which the courts have no right to interfere, unless it is so clearly arbitrary or unreasonable as to invade some constitutional

deavored to force both employer and employé to elect to adopt compensation by penalizing both for their refusal to so elect. The employers who fail to come under the compensation features of the various statutes are penalized by being prohibited from setting up any of the common-law defenses of assumption of risk and negligence of fellow servant. The defense of contributory negligence has been abolished also, in whole or in part, as to such employers as refuse to embrace compensation. To induce employés also to elect to demand "compensation" in place of "damages," it is provided generally in the statutes passed since the *Ives* case was decided, that when an employer elects to pay compensation and his employé elects to reserve his common-law right of action for damages, that then the employer is free to set up the three common-law defenses enumerated above, as against any employé who brings an action for damages under such a reservation.

While the legislatures of other States have taken this method of circumventing the doctrine of the *Ives* case the courts of Massachusetts, Ohio, Washington and Wisconsin, as well as the Supreme Court of the United States, have expressed more or less disapproval of the doctrine announced by the New York Court of Appeals. The other decisions to which reference is made above will be found in a subsequent portion of this chapter.

right. A State may classify persons and objects for the purpose of legislation, provided the classification is based on proper and justifiable distinctions and for a purpose within the legislative power.

3. In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government.
4. A statute which compels an employer to compensate his employé for injuries without regard to the fault of the employé takes the property of the employer without due process of law and is therefore repugnant to the Fourteenth Amendment of the Federal Constitution and to similar provisions in the state constitution, nor can it be justified as being within the police power of the State.

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered October 25, 1910, which affirmed a final judgment in favor of plaintiff entered upon a decision of the court at Special Term sustaining a demurrer to the answer.

This is an action brought by an employé against his employer to recover compensation under article 14a of the Labor Law, being Chapter 674 of the Laws of 1910, entitled "An act to amend the labor law, in re-

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lation to workmen's compensation in certain dangerous employments."

The complaint alleges, in substance, that on the second day of April, 1910, while the plaintiff was engaged in his work as a switchman on defendant's steam railroad, he was injured solely by reason of a necessary risk or danger of his employment; that at the time of the commencement of the action he had been totally incapacitated for labor for a period of three weeks, and that such incapacity would continue for four weeks longer, and demands judgment for compensation in accordance with the provisions of said act for a period of five weeks. The answer, after admitting all the allegations of the complaint, pleads as a defense the unconstitutionality of article 14a of the Labor Law, upon the ground that it contravenes certain provisions of the Federal and state constitutions. The plaintiff demurred to this defense on the ground that it was insufficient in law upon the face thereof. The issue of law thus presented was tried at Special Term, where the demurrer was sustained. Final judgment was entered upon this decision, and the defendant appealed to the Appellate Division, where the judgment was affirmed by a divided court.

This statute which has been added to the Labor Law is known as article 14a thereof, and consists of twelve sections, which we quote in full. The question presented upon this appeal is whether it is repugnant to any of the provisions of the Federal and state constitutions invoked by the defendant.

**"WORKMEN'S COMPENSATION IN CERTAIN DANGEROUS
EMPLOYMENTS**

"§ 215. *Application of article.* This article shall apply only to workmen engaged in manual or mechanical labor in the following employments, each of which is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

"1. The erection or demolition of any bridge or building in which there is, or in which the plans and specifications require, iron or steel frame work.

"2. The operation of elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge or building for the conveying of materials in connection with the erection or demolition of such bridge or building.

"3. Work on scaffolds of any kind elevated twenty feet or more above the ground, water, or floor beneath in the erection, construction, painting, alteration or repair of buildings, bridges or structures.

"4. Construction, operation, alteration or repair of wires, cables, switchboards or apparatus charged with electric currents.

"5. All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry.

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"6. The operation on steam railroads of locomotives, engines, trains, motors or cars propelled by gravity or steam, electricity or other mechanical power, or the construction or repair of steam railroad tracks and roadbeds over which such locomotives, engines, trains, motors or cars are operated.

"7. The construction of tunnels and subways.

"8. All work carried on under compressed air.

"§ 216. *Definitions.* The words, 'employer,' 'workman' and 'employment,' or their plurals, used in this article, shall be construed to apply to all the employments above described.

"§ 217. *Basis of liability.* If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment after this article takes effect is caused to any workman employed therein, in whole or in part, or the damage or injury caused thereby is in whole or part contributed to by

"a. A necessary risk or danger of the employment or one inherent in the nature thereof; or

"b. Failure of the employer of such workmen or any of his or its officers, agents or employés to exercise due care, or to comply with any law affecting such employment; then such employer shall, subject as hereinafter mentioned, be liable to pay compensation at the rates set out in section two hundred and nineteen-a of this title; provided that the employer shall not be liable in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed, and provided that the employer shall not be liable in respect of any injury to the workman which

is caused in whole or in part by the serious and willful misconduct of the workman.

“§ 218. *Rights of action not affected.* The right of action for damages caused by any such injury, at common law or under any statute in force on January one, nineteen hundred and ten, shall not be affected by this article, and every existing right of action for negligence or to recover damages for injuries resulting in death is continued, and nothing in this article shall be construed as limiting such right of action, but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this article, either by accepting any compensation hereunder in accordance with section two hundred and nineteen-a hereof, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in and deemed thereby to have released every other action at common law or under any other statute on account of the same injury after this article takes effect. In case after such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law or under any statute other than this article against the employer therefor he shall be barred from all benefit of this article in regard thereto.

“§ 219. *Notice of accident.* No proceedings for compensation under this article shall be maintained unless notice of the accident as hereinafter provided has been given to the employer as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and during such disability, but no want or defect or inaccuracy of a notice shall be a bar to the maintenance

of proceedings unless the employer proves that he is prejudiced by such want, defect or inaccuracy. Notice of the accident shall state the name and address of the workman injured, the date and place of the accident, and in simple language the physical cause thereof, if known. The notice may be served personally or by sending it by mail in a registered letter addressed to the employer at his last known residence or place of business.

“§ 219*a*. *Scale of compensation*. The amount of compensation shall be in case death results from injury:

“*a*. If the workman leaves a widow or next of kin at the time of his death wholly dependent on his earnings, a sum equal to twelve hundred times the daily earnings of such workman at the rate at which he was being paid by such employer at the time of the injury subject as hereinafter provided, and in no event more than three thousand dollars. Any weekly payments made under this article shall be deducted in ascertaining such amount.

“*b*. If such widow or next of kin at the time of his death are in part only dependent upon his earnings, such proportionate sum not exceeding that provided in subdivision *a* as may be determined according to the injury to such dependents.

“*c*. If he leaves no dependents, the reasonable expenses of his medical attendance and burial, not exceeding one hundred dollars.

“Whatever sum may be determined to be payable under this article in case of death of the injured workman shall be paid to his legal representative for the benefit of such dependents, or if he leaves no such dependents, for the benefit of the persons to whom

the expenses of medical attendance and burial are due.

"2. Where total or partial incapacity for work at any gainful employment results to the workman from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity, subject as herein provided, equal to fifty per centum of his average weekly earnings when at work on full time during the preceding year during which he shall have been in the employment of the same employer, or if he shall have been in the employment of the same employer for less than a year, then a weekly payment of not exceeding three times the average daily earnings on full time for such less period. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average earnings of the workman before the accident and the average amount he is able to earn thereafter as wages in the same employment or otherwise. In fixing the amount of the weekly payment, regard shall be had to any payment, allowance or benefit which the workman may have received from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in the same employment or otherwise after the accident, but shall amount to one-half of such difference. *In no event shall any compensation paid under this article exceed the damage suffered, nor shall any weekly payment payable under this article in any event exceed ten dollars a week or extend*

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over more than eight years from the date of the accident.

“§ 219b. *Medical examinations.* Any workman entitled to receive weekly payments under this article is required, if requested by the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within three weeks after the injury, and thereafter at intervals not oftener than once in six weeks. If the workman refuses to submit to such examination, or obstructs the same, his right to weekly payments shall be suspended until such examination has taken place, and no compensation shall be payable, during or for account of such period.

“§ 219c. *Incompetency of workman.* In case an injured workman shall be mentally incompetent at the time when any right or privilege accrues to him under this article, a committee or guardian of the incompetent appointed pursuant to law may, on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the workman himself had been competent and had claimed or exercised any such right or privilege; and no limitation of time in this article provided for shall run so long as said incompetent workman has no committee or guardian.

“§ 219d. *Settlement of disputes.* Any question which may arise under this act shall be determined either by agreement or by arbitration as provided in the Code of Civil Procedure or by an action at law as herein provided. In case the employer fail to make compensation as herein provided, the injured workman, or his

committee or guardian, if such be appointed; or his executor or administrator, may then bring an action to recover compensation under this article in any court having jurisdiction thereof, or in any court which would have had jurisdiction of an action for recovery of damages for negligence for the same injury between the same parties. This article, however, shall not be construed as extending the jurisdiction of any such court to award judgment for an amount greater than now allowed by law. Such action shall be conducted in the same manner as actions at law for the recovery of damages for negligence. The judgment in such action if in favor of the plaintiff shall be for a sum equal to the amount of payments then due and prospectively due under this article. Such action must be commenced within six months after the happening of the accident or in case of the death of the workman by such accident within six months after the appointment of his legal representative in this State, or in the event of his physical incapacity, within six months after the removal thereof, or in the event of weekly payments by the employer hereunder, within six months after such payments have ceased. In such an action by an executor or administrator the judgment may provide the proportions of the award or the costs to be distributed to or between the several dependents. If such determination is not made it shall be determined by the Surrogate's Court, in which such executor or administrator is appointed, in accordance with this article, on petition of any party interested on such notice as such court may direct.

“§ 219e. *Preferences and exemptions.* Any person entitled to weekly payments under this article against

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any employer shall have the same preferential claim therefor against the assets of the employer as allowed by law for a claim by such person against such employer for unpaid wages or personal services. Weekly payments due under this article shall not be assignable or subject to levy, execution or attachment.

“§ 219f. *Attorneys' liens.* No claim of an attorney at law for any contingent interest in any recovery under this article for services in securing such recovery or for disbursements shall be an enforceable lien on such recovery, unless the amount of the same be approved in writing by a justice of the Supreme Court, or in case the same be tried in any court, by the justice presiding at such trial.

“§ 219g. *Liability of principal contractors.* If an employer who shall be the principal enters into a contract with an independent contractor, to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, the said principal shall be liable to pay to any workman employed in the execution of the work any compensation under this article which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal then, in the application of this article, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the contractor or employer by whom he is immediately employed. Where such principal is liable to pay compensation he shall

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be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section. Nothing in this section shall be construed as preventing a workman from recovering compensation under this article from the contractor or subcontractor, instead of the principal; nor shall this section apply in any case where the accident shall occur elsewhere than on, or in, or about the premises on which the principal has undertaken to execute the work or which are otherwise under his control or management."

Louis Marshall, Charles B. Sears and Louis L. Babcock, for appellant.

Juhen T. Davies and Harold Harper for New York Dock Company, intervening.

Thomas C. Burke, for respondent.

Everett P. Wheeler for Civic Federation, intervening.

Joseph P. Cotton, Jr., intervening.

WERNER, J.:

In 1909 the legislature passed a law (Chapter 518) providing for a commission of fourteen persons, six of whom were to be appointed by the governor, three by the president of the senate from the senate, and five by the speaker of the assembly from the assembly, "to make inquiry, examination and investigation into the working of the law in the State of New York relative to the liability of employers to employes for industrial

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accidents, and into the comparative efficiency, cost, justice, merits and defects of the laws of other industrial States and countries, relative to the same subject, and as to the causes of the accidents to employés." The act contained other provisions germane to the subject and provided for a full and final report to the legislature of 1910, if practicable, and if not practicable, then to the legislature of 1911, with such recommendations for legislation by bill or otherwise as the commission might deem wise or expedient. Such a commission was appointed and promptly organized by the election of officers and the appointment of subcommittees, the chairman being Senator Wainwright, from whom it has taken the name of the "Wainwright Commission," by which it is popularly known. No word of praise could overstate the industry and intelligence of this commission in dealing with a subject of such manifold ramifications and of such far-reaching importance to the State, to employers and to employés. We cannot dwell in detail upon the many excellent features of its comprehensive report, because the limitations of time and space must necessarily confine us to such of its aspects as have a necessary relation to the legal questions which we are called upon to decide. As the result of its labors the commission recommended for adoption the bill which, with slight changes, was enacted into law by the legislature of 1910, under the designation of article 14a of the Labor Law. This act is modeled upon the English Workmen's Compensation Act of 1897, which has since been extended so as to cover every kind of occupational injury. Our commission has frankly stated in its report that the classification of the industries which will be immediately affected

by the present statute is only tentative, and that other more extended classifications will probably be recommended to the legislature for its action.

The statute, judged by our common-law standards, is plainly revolutionary. Its central and controlling feature is that every employer who is engaged in any of the classified industries shall be liable for any injury to a workman arising out of and in the course of the employment by "a necessary risk or danger of the employment or one inherent in the nature thereof; * * * provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman." This rule of liability, stated in another form, is that the employer is responsible to the employé for every accident in the course of the employment, whether the employer is at fault or not, and whether the employé is at fault or not, except when the fault of the employé is so grave as to constitute serious and willful misconduct on his part. The radical character of this legislation is at once revealed by contrasting it with the rule of the common law, under which the employer is liable for injuries to his employé only when the employer is guilty of some act or acts of negligence which caused the occurrence out of which the injuries arise, and then only when the employé is shown to be free from any negligence which contributes to the occurrence. The several judicial and statutory modifications of this broad rule of the common law we shall further on have occasion to mention. Just now our purpose is to present in sharp juxtaposition the fundamentals of these two opposing rules, namely, that under the common law an employer is liable to his injured

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employé only when the employer is at fault and the employé is free from fault; while under the new statute the employer is liable, although not at fault, even when the employé is at fault, unless this latter fault amounts to serious and willful misconduct. The reasons for this departure from our long-established law and usage are summarized in the language of the commission as follows:

"First, that the present system in New York rests on a basis that is economically unwise and unfair, and that in operation it is wasteful, uncertain and productive of antagonism between workmen and employers.

"Second, that it is satisfactory to none and tolerable only to those employers and workmen who practically disregard their legal rights and obligations, and fairly share the burden of accidents in industries.

"Third, that the evils of the system are most marked in hazardous employments, where the trade risk is high and serious accidents frequent.

"Fourth, that, as matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and, therefore, the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want."

This indictment of the old system is followed by a statement of the anticipated benefits under the new statute as follows: "These results can, we think, be best avoided by compelling the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community. In those employments which have not so great an element of danger,

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in which, speaking generally, there is no such imperative demand for the exercise of the police power of the State for the safeguarding of its workers from destitution and its consequences, we recommend, as the first step in this change of system, such amendment of the present law as will do away with some of its unfairness in theory and practice, and increase the workman's chance of recovery under the law. With such changes in the law we couple an elective plan of compensation which, if generally adopted, will do away with many of the evils of the present system. Its adoption will, we believe, be profitable to both employer and employé, and prove to be the simplest way for the State to change its system of liability without disturbance of industrial conditions. Not the least of the motives moving us is the hope that by these means a source of antagonism between employer and employed, pregnant with danger for the State, may be eliminated."

This quoted summary of the report of the commission to the legislature, which clearly and fairly epitomizes what is more fully set forth in the body of the report, is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally and legally unsound. Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions. In that respect we are unlike any of the

countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written constitution, and the Parliament or lawmaking body is supreme. In our country the Federal and state constitutions are the charters which demark the extent and the limitations of legislative power; and while it is true that the rigidity of a written constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that which, for want of a better name, we call public opinion.

With these considerations in mind we turn to the purely legal phases of the controversy for the purpose of disposing of some things which are incidental to the main question. The new statute, as we have observed, is totally at variance with the common-law theory of the employer's liability. Fault on his part is no longer an element of the employé's right of action. This change necessarily and logically carries with it the abrogation of the "fellow-servant" doctrine, the "contributory negligence" rule, and the law relating to the employé's assumption of risks. There can be no doubt that the first two of these are subjects clearly and fully within the scope of legislative power; and that as to the third, this power is limited to some extent by constitutional provisions.

The "fellow-servant" rule is one of judicial origin engrafted upon the common law for the protection of the master against the consequences of negligence in which he has no part. In its early application to simple industrial conditions it had the support of both reason

and justice. By degrees it was extended until it became evident that under the enormous expansion and infinite complexity of our modern industrial conditions the rule gave opportunity, in many instances, for harsh and technical defenses. In recent years it has been much restricted in its application to large corporate and industrial enterprises, and still more recently it has been modified and, to some extent abolished, by the Labor Law and the Employers' Liability Act.

The law of contributory negligence has the support of reason in any system of jurisprudence in which the fault of one is the basis of liability for injury to another. Under such a system it is at least logical to hold that one who is himself to blame for his injuries should not be permitted to entail the consequences upon another who has not been negligent at all, or whose negligence would not have caused the injury if the one injured had been free from fault. It may be admitted that the reason of the rule is often lost sight of in the effort to apply it to a great variety of practical conditions, and that its efficacy as a rule of justice is much impaired by the lack of uniformity in its administration. In the admiralty branch of the Federal courts, for instance, we have what is known as the rule of comparative negligence under which, when there is negligence on both sides, it is apportioned and a verdict rendered accordingly. In many of the States contributory negligence is a defense which must be pleaded and proved by the defendant, and in some States it has been entirely abrogated by statute. In our own State the plaintiff's freedom from contributory negligence is an essential part of his cause of action which must be affirmatively established by him, except in

cases brought by employés under the Labor Law, by virtue of which the contributory negligence of an employé is now made a defense which must be pleaded and proved by the employer; and under the Employers' Liability Act which provides that the employé's continuance in his employment after he has knowledge of dangerous conditions from which injury may ensue, shall not, as matter of law, constitute contributory negligence.

Under the common law the employé was also held to have assumed the ordinary and obvious risks incident to the employment, as well as the special risks arising out of dangerous conditions which were known and appreciated by him. This doctrine, too, has been modified by statute so that under the Labor Law and the Employers' Liability Act the employé is presumed to have assented to the necessary risks of the occupation or employment and no others; and these necessary risks are defined as those only which are inherent in the nature of the business and exist after the employer has exercised due care in providing for the safety of his employés, and has complied with the laws affecting or regulating the business or occupation for the greater safety of employés.

We have said enough to show that the statutory modifications of the "fellow-servant" rule and the law of "contributory negligence" are clearly within the legislative power. These doctrines, for they are nothing more, may be regulated or even abolished. This is true to a limited extent as to the assumption of risk by the employé. In the Labor Law and the Employers' Liability Act, which define the risks assumed by the employé, there are many provisions which cast upon

the employer a great variety of duties and burdens unknown to the common law. These can doubtless be still further multiplied and extended to the point where they deprive the employer of rights guaranteed to him by our constitutions, and there, of course, they must stop, as we shall endeavor to demonstrate later on.

Passing now to the constitutional objections which are presented against the new statute, we will first eliminate those which we regard as clearly or probably untenable. The appellant argues and the respondent admits that the new statute cannot be upheld under the reserved power of the legislature to alter and amend charters. It is true that the defendant in the case at bar is a railroad corporation, but the act applies to eight enumerated occupations or industries without regard to the character of the employers. They may be corporations, firms or individuals. Nowhere in the act is there any reference to corporations. The liability sought to be imposed is based upon the nature of the employment and not upon the legal status of the employer. It is, therefore, unnecessary to decide how far corporate liability may be extended under the reserved power to alter or amend charters, except as that question may be incidentally discussed in considering the police power of the State.

The appellant contends that the classification in this statute, of a limited number of employments as dangerous, is fanciful or arbitrary and is therefore repugnant to that part of the Fourteenth Amendment to the Federal Constitution which guarantees to all our citizens the equal protection of the laws. Classification for purposes of taxation or of regulation under

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the police power, is a legislative function with which the courts have no right to interfere unless it is so clearly arbitrary or unreasonable as to invade some constitutional right. A State may classify persons and objects for the purpose of legislation provided the classification is based on proper and justifiable distinctions (*St. John v. New York*, 201 U. S. 633; *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205; *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210; *Chicago, K. & W. R. R. Co. v. Pontius*, 157 U. S. 209), and for a purpose within the legislative power. There can be no doubt, we think, that all of the occupations enumerated in the statute are more or less inherently dangerous to a degree which justifies such legislative regulation as is properly within the scope of the police power. We need not look for illustration or authority outside of the Labor Law to which this new statute has been added. The whole of that law which precedes the latest addition is devoted to restrictions and regulations imposed upon employers in specified occupations or conditions for the conservation of the health, safety and morals of employ  s. These restrictions and regulations do not affect all employers alike in all occupations, nor are they designed to have that effect. The mandate of the Federal Constitution is complied with if all who are in a particular class are treated alike (*Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 523; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Magoun v. Ill. Trust & Sav. Bank*, 170 U. S. 283, 294; *People ex rel. Hatch v. Reardon*, 184 N. Y. 431; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 16), and that, we think, is the effect of this classification.

Another objection urged against the statute is that it violates § 2 of article 1 of our state constitution which provides that "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." This objection is aimed at the provisions of §§ 219a and 219d of the statute, which relate to the "scale of compensation" and "settlement of disputes," and has no reference to the fundamental question whether the attempt to impose upon the employer a liability when he is not at fault, constitutes a taking of property without due process of law. In other words, the objection which we are now considering bears solely upon the question whether the two last-mentioned sections of the statute deprive the employer of the right to have a jury fix the amount which he shall pay when his liability to pay has been determined against him. If these provisions relating to compensation are to be construed as definitely fixing the amount which an employer must pay in every case where his liability is established by the statute, there can be no doubt that they constitute a legislative usurpation of one of the functions of a common-law jury. In all cases where there is a right to trial by jury there are two elements which necessarily enter into a verdict for the plaintiff: 1. The right to recover. 2. The amount of the recovery. It is as much the right of a defendant to have a jury assess the damages claimed against him as it is to have the question of his liability determined by the same body. *East Kingston v. Towle*, 48 N. H. 57; *Wadsworth v. Union Pacific Ry. Co.*, 18 Colo. 600; *Fairchild v. Rich*, 68 Vt. 202. This part of the statute, in its present form, has given rise to conflicting views among the members of the court, and since the disposition of the question

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which it suggests is not necessary to the decision of the case, we do not decide it.

Thus far we have considered only such portions of the statute as we deem to be clearly within the legislative power, and one as to which there is difference of opinion. This we have done because we desire to present no purely technical or hypercritical obstacles to any plan for the beneficent reformation of a branch of our jurisprudence in which, it may be conceded, reform is a consummation devoutly to be wished. In this spirit we have called attention to those features of the new statute which might be upheld as consonant with legislative authority under our constitutional limitations, as well as to the sections upon which we are in doubt. We turn now to the two objections which we regard as fatal to its validity.

This legislation is challenged as void under the Fourteenth Amendment to the Federal Constitution and under § 6, article 1 of our state constitution, which guarantee all persons against deprivation of life, liberty or property without due process of law. We shall not stop to dwell at length upon definitions of "life," "liberty," "property" and "due process of law." They are simple and comprehensive in themselves and have been so often judicially defined that there can be no misunderstanding as to their meaning. Process of law in its broad sense means law in its regular course of administration through courts of justice, and that is but another way of saying that every man's right to life, liberty and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our constitutions were adopted. "Due process of law implies the right of

the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him this is not due process of law." *Zeigler v. S. & N. Ala. R. R. Co.*, 58 Ala. 594. Liberty has been authoritatively defined as "the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation" (*Matter of Jacobs*, 98 N. Y. 98, 106); and the right of property as "the right to acquire, possess and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State." *Bertholf v. O'Reilly*, 74 N. Y. 509, 515. The several industries and occupations enumerated in the statute before us are concededly lawful within any of the numerous definitions which might be referred to, and have always been so. They are, therefore, under the constitutional protection. One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to the employers enumerated in the new statute, and as to them it provides that they shall be liable to their employes for personal injury by accident to any workman arising out of and in the course of

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the employment which is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment or one inherent in the nature thereof, except that there shall be no liability in any case where the injury is caused in whole or in part by the serious and willful misconduct of the injured workman. It is conceded that this is a liability unknown to the common law and we think it plainly constitutes a deprivation of liberty and property under the Federal and state constitutions, unless its imposition can be justified under the police power which will be discussed under a separate head. In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employé should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that, under our present system, the loss falls immediately upon the employé who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific and wasteful, and fosters a spirit of antagonism between employer and employé which it is to the interest of the State to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we

think it is an appeal which must be made to the people and not to the courts. The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. Law as used in this sense means the basic law and not the very act of legislation which deprives the citizen of his rights, privileges or property. Any other view would lead to the absurdity that the constitutions protect only those rights which the legislatures do not take away. If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words. *Wynehamer v. People*, 13 N. Y. 378; *Taylor v. Porter*, 4 Hill, 140, 145; *Norman v. Heist*, 5 Watts & Serg. 171; *Hoke v. Henderson*, 4 Dev. 15. As stated by Judge COMSTOCK in the case of *Wynehamer v. People*, "These constitutional safeguards, in all cases, require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the pre-existing rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed" (p. 395). If the

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argument in support of this statute is sound we do not see why it cannot logically be carried much further. Poverty and misfortune from every cause are detrimental to the State. It would probably conduce to the welfare of all concerned if there could be a more equal distribution of wealth. Many persons have much more property than they can use to advantage and many more find it impossible to get the means for a comfortable existence. If the legislature can say to an employer, "You must compensate your employé for an injury not caused by you or by your fault," why can it not go further and say to the man of wealth, "You have more property than you need and your neighbor is so poor that he can barely subsist; in the interest of natural justice you must divide with your neighbor so that he and his dependents shall not become a charge upon the State?" The argument that the risk to an employé should be borne by the employer because it is inherent in the employment, may be economically sound, but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employé, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking

the property of A and giving it to B, and that cannot be done under our constitutions. Practical and simple illustrations of the extent to which this theory of liability might be carried could be multiplied *ad infinitum*, and many will readily occur to the thoughtful reader. There is, of course, in this country no direct legal authority upon the subject of the liability sought to be imposed by this statute, for the theory is not merely new in our system of jurisprudence, but plainly antagonistic to its basic idea. The English authorities are of no assistance to us, because in the king's courts the decrees of the Parliament are the supreme law of the land, although they are interesting in their disclosures of the paternalism which logically results from a universal employers' liability based solely upon the relation of employer and employé, and not upon fault in the employer. There are a few American cases, however, which clearly state the legal principle which, we think, is applicable to the case at bar, and with a brief reference to them we shall close this branch of the discussion. In the *Nitroglycerin* case (*Parrot v. Wells, Fargo & Co.*, 15 Wall. 524) the plaintiff, who was the common landlord of the defendants and other tenants, sought to hold the defendants liable for damages occasioned to the premises occupied by the other tenants, by an explosion of nitroglycerin which had been delivered to the defendants as common carriers for shipment. It appeared that the defendants were innocently ignorant of the contents of the packages containing the dangerous explosives, and that they were guilty of no negligence in receiving or handling them. Upon these facts the Federal Supreme Court held that it was a case of unavoidable accident for which no one was legally re-

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sponsible. In *Ohio & Mississippi Ry. Co. v. Lackey*, 78 Ill. 55, the question was whether the railroad company was liable under a statute which provided that "every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise." In speaking of the effect of that section of the law Mr. Justice BREESE observed: "An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful and of great public benefit. It is not claimed that the liability attaches for the violation of any law, the omission of any duty or the want of proper care or skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute. A passenger on a train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases." To the same effect are the numerous cases arising under statutes passed by different States imposing upon

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railroad corporations absolute liability for killing or injuring upon their rights of way horses, cattle, etc., by running over them, in which this liability was held to constitute a deprivation of property without due process of law. *Jensen v. Union Pacific Ry. Co.*, 6 Utah, 253; *Ziegler v. South & North Alabama Ry. Co.*, 58 Ala. 594; *Birmingham Ry. Co. v. Parsons*, 100 Ala. 662; *Bielingbery v. Montana Union Ry. Co.*, 8 Mont. 271; *Schenk v. Union Pacific Ry. Co.*, 5 Wyo. 430; *Cottrell v. Union Pacific Ry. Co.*, 2 Wyo. 540.

A different interpretation has been given to statutes imposing upon railroad corporations the duty to fence their rights of way, under which the liability is imposed for failure to obey the command of the statutes. *Quackenbush v. Wis. & M. R. R. Co.*, 62 Wis. 411; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512; *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26. "But even such statutes," says Black in his work on Constitutional Law (2d ed., p. 351), "cannot go beyond the imposition of such a penalty in cases where the fault lies at the door of the company. If the law attempts to make such companies liable for accidents which were not caused by their negligence or disobedience of the law, but by the negligence of others or by uncontrollable causes, or does not give the company an opportunity to show these facts in its own defense, it is void."

We conclude, therefore, that in its basic and vital features the right given to the employé by this statute, does not preserve to the employer the "due process" of law guaranteed by the constitutions, for it authorizes the taking of the employer's property without his consent and without his fault. So far as the statute merely creates a new remedy in addition to those which existed

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before it is not invalid. The State has complete control over the remedies which it offers to suitors in its courts even to the point of making them applicable to rights or equities already in existence. It may change the common law and the statutes so as to create duties and liabilities which never existed before. It is true, as stated by Mr. Justice BROWN in *Holden v. Hardy*, 169 U. S. 366, 385, 386, that "the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. * * * The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the illumination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession and transmission

of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the States homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the States grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority." The power of the State to make such changes in methods of procedure and in substantive law is clearly recognized. *Hurtado v. California*, 110 U. S. 516; *Hayes v. Missouri*, 120 U. S. 68; *Missouri Pac. Railway Co. v. Mackey*, 127 U. S. 205; *Hallinger v. Davis*, 146 U. S. 314; *Matter of Kemmler*, 136 U. S. 436; *Duncan v. Missouri*, 152 U. S. 377. We repeat, however, that this power must be exercised within the constitutional limitations which prescribe the law of the land. "Due process of law" is process due according to the law of the land, and the phrase as used in the Fourteenth Amendment of the Federal Constitution with reference to the power of the States means the general law of the several States as fixed or guaranteed by their constitutions. As stated by Mr. Webster, in the *Dartmouth College* case, "The law of the land is the general law; the law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

If we are warranted in concluding that the new statute violates private right by taking the property of one

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and giving it to another without due process of law, that is really the end of this case. But the auspices under which this legislation was enacted, no less than its intrinsic importance, entitle its advocates to the fullest consideration of every argument in its support, and we, therefore, take up the discussion of the police power under which this law is sought to be justified. The police power is, of course, one of the necessary attributes of civilized government. In its most comprehensive sense it embraces the whole system by which the State seeks to preserve the public order, to prevent offenses against the law, to insure to citizens in their intercourse with each other the enjoyment of their own so far as is reasonably consistent with a like enjoyment of rights by others. Under it persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. But it is a power which is always subject to the Constitution, for in a constitutional government limitation is the abiding principle, exhibited in its highest form in the Constitution as the deliberative judgment of the people, which moderates every claim of right and controls every use of power. In the language of Chief Justice SHAW, in *Commonwealth v. Alger*, 7 Cush. 85: "It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." It covers a multitude of things, that are designed to protect life, limb, health, comfort, peace and property according to the maxim *sic utere tuo ut alienum non lædas*, but its exercise is justified only when it appears that the interests of the public generally, as distinguished from those of a particular class, require

it, and when the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive. *Lawton v. Steele*, 152 U. S. 133, 137; *Colon v. Lisk*, 153 N. Y. 188, 196; *Wright v. Hart*, 182 N. Y. 330. In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government. Concrete illustrations of what may and what may not be done under the police power are to be found in this very Labor Law of which the new statute is a part. As this statute stood before article 14a was added, it regulated electric work, the operation of elevators, work on scaffolds, work with explosives and compressed air, the construction of tunnels and railroad work. It regulated the hours of work in certain employments; it directed the payment of wages in cash at specified periods; it provided for the protection of employes engaged in the erection of buildings; it compelled the employer to guard dangerous and exposed machinery and to construct fire escapes and ventilating appliances; it required him to provide toilet facilities, pure drinking water and sanitary arrangements and prohibited the

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employment of women, and of children under certain ages, in specified occupations; it regulated the hours of labor of minors; it modified the fellow-servant rule, the law of contributory negligence and the assumption of risks; and, in short, it imposed upon the employer many restrictions and duties which were unknown to the common law. Broadly classified, all these and similar statutory provisions which are designed, in one way or another, to conserve the health, safety or morals of the employés and to increase the duties and responsibilities of the employer, are rules of conduct which properly fall within the sphere of the police power. *Holden v. Hardy*, 169 U. S. 366; *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205. But the new addition to the Labor Law is of quite a different character. It does nothing to conserve the health, safety or morals of the employés, and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault, and solely through the fault of the employé, except where the latter fault is such as to constitute serious and willful misconduct. Under this law, the most thoughtful and careful employer, who has neglected no duty, and whose workshop is equipped with every possible appliance that may make for the safety, health and morals of his employés, is liable in damages to any employé who happens to sustain injury through an accident which no human being can foresee or prevent, or which, if preventable at all, can only be prevented by the reasonable care of the employé himself. That this is the unmistakable theory and purpose of the act is made perfectly plain by the recital in § 215,

which sets forth that from the nature, conditions or means of prosecution of the work in the employments which are classified as dangerous, "extraordinary risks to the life and limb of workmen engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen." And to make the matter still more plain, the learned counsel for the commission argues in his brief that "if it is competent for the legislature to say to the employer in a dangerous trade, 'use the utmost care in giving your workmen safe work, so that no act of yours, or implement of yours, or work that you set them to do shall hurt them, and if you fail you shall be liable in damages,' if it is competent to make such a law, then it is equally competent to say as in this new act directly, 'you shall be responsible for all damages caused by unsafe condition of work,' and that is just what the liability for trade risks under the new act means." In this argument the learned counsel ignores, or at least misses, as we think, the vital distinction between legislation which imposes upon an employer a legal duty, for the failure to perform which he may be penalized or rendered liable in damages, and legislation which makes him liable notwithstanding he has faithfully observed every duty imposed upon him by law. At pages 46 and 47 of the report of the commissioners are quoted the several pertinent provisions of our state constitution. Article 1, § 18; article 1, § 2; article 1, § 1; article 1, § 6. With reference to these, the commissioners say: "It is obvious, on a mere reading, that the first section makes it impossible for the legislature to enact any law which will take away

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from the representatives of an injured workman the right of action there named for injuries causing death, nor can the legislature limit it in any way. It is equally obvious, it seems to us, that it was the intention of the second section of the Constitution (article 1, § 2), to provide that in all controversies in the courts of law either side should finally have a right to a jury trial on the question of liability, and however successful or unsuccessful jury trials may be in cases of employers' liability, or in other cases, that solemn mandate of the Constitution cannot be set aside. The third and fourth sections of the Constitution above quoted are practically those which, like the Fourteenth Amendment of the Federal Constitution, provide for due process of law in all legislation, that is, speaking generally, which prohibit the passage by the legislature of such legislation as shall arbitrarily deprive any of the citizens of the State of life, liberty or property."

These are interesting and salient admissions, but the ease with which these constitutional provisions are brushed aside is startling. Continuing, the commissioners say: "But we regard it as settled that the legislature has power, if it so chooses, to change or abrogate the common law on employers' liability, or the Employers' Liability Act, or any other statutes in regard thereto. * * * The legislature of this State, in the exercise of its general powers, * * * has in the past so legislated as to prescribe that employers in New York industries, shall conduct their business, use their machines and use their property in such ways as shall conduce to the safety of the employés and the prevention of accident and disease. Such is the whole purpose of the Labor Law. * * * We are of opinion that it is

competent for the legislature to take a further step and provide conditions of the carrying on of such dangerous industries—not at the moment conditions as to the method of carrying them on—but conditions providing that any man in the State who carries on such dangerous trades shall be liable to make compensation to the employés injured either by the fault of the employer, or by those unavoidable risks of the employment. The effect of such a statute would be to reverse the common law doctrine that the employé assumes the risk of his employment.”

With all due respect to the members of the commission we beg to observe that the statute enacted in conformity with their recommendations, does not stop at reversing the common law; it attempts to reverse the very provisions of the Constitution which, the commissioners admit, are obviously beyond the reach of the legislature. We cannot understand by what power the legislature can take away from the employer a constitutional guaranty of which the employé may not also be deprived. If it is beyond the power of the legislature to take from the representatives of deceased employés their rights of action under the Constitution, by what measure of power or justice may the legislature assume to take from the employer the right to have his liability determined in an action at law? Conceding, as we do, that it is within the range of proper legislative action to give a workman two remedies for a wrong when he had but one before, we ask, by what stretch of the police power is the legislature authorized to give a remedy for no wrong? If, before the passage of this law, the employer had a right to a jury trial upon the question of liability, where and how did he lose it?

Can it be taken from him by the mere assertion that this statute only reverses the common-law doctrine that the employé assumes the risk of his employment? It would be quite as logical and effective to argue that this legislation only reverses the laws of nature, for in everything within the sphere of human activity the risks which are inherent and unavoidable must fall upon those who are exposed to them. We must admit that what the legislature may prohibit it may absolutely control. Where the right to exist, as in case of corporations, depends upon the will of the legislature, that right may be granted subject to prescribed conditions. In such a case an employer may be made an insurer of the safety of his employés as a condition of the permission to engage in business. But when an industry or calling is *per se* lawful and open to all, and, therefore, beyond the prohibitive power of the legislature, the right of governmental control must be confined to such reasonable enactments as are directly designed to conserve health, safety, comfort, morals, peace and order. *Lochner v. New York*, 198 U. S. 45. For the failure of an employer to observe such regulations the legislature may unquestionably enact direct penalties or create presumptions of fault which, if not rebutted by proof, may be regarded as sufficient evidence of liability for damages. That must be the extreme limit of the police power, for just beyond is the Constitution which, in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault.

The limitations of the police power are illustrated in a great variety of cases. In *Matter of Jacobs*, 98

N. Y. 98, 99, it was held that an act was void which made it a misdemeanor to manufacture cigars or prepare tobacco in certain tenements. In *People v. Marx*, 99 N. Y. 377, this court condemned an act absolutely prohibiting the manufacture or sale of oleomargarine, upon the ground that it interfered with a lawful industry, not injurious to the public and not fraudulently conducted, although in a later case (*People v. Arensberg*, 105 N. Y. 123), another statute relating to the same subject was upheld because it was directly aimed at a designed and intentional imitation of dairy butter. In *People v. Gillson*, 109 N. Y. 389, 404, it was held that a statute was not within the police power which prohibited the sale or disposal of any article of food upon any representation or inducement that anything else will be delivered as a gift, prize, premium or reward to the purchaser. The ground of the decision was that it was not a health law; that it was not designed to prevent the adulteration of food, and that it was not in the power of the legislature to convert an innocent act into a crime. In *Colon v. Lisk*, 153 N. Y. 188, the statute under consideration provided for the summary seizure of any boat or vessel, used by one person in interfering with the oysters or shell fish of another, and for its forfeiture and sale. It was held that the statute sanctioned an unauthorized confiscation of private property for the mere protection of private rights and was not within the police power of the State. In *People v. Hawkins*, 157 N. Y. 1, this court decided that a statute was void which made it a misdemeanor to sell or expose for sale any goods made in a penal institution unless they were labeled "convict made." In *People v. Orange County Road Con. Co.*, 175 N. Y. 84,

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it was held that the State cannot dictate to independent contractors on state work the hours of labor which they shall prescribe for their employés, where there was nothing in the character of the work or in the provisions of the contract to justify legislative interference. In *Beardsley v. N. Y., L. E. & W. R. R. Co.*, 162 N. Y. 230, what is known as the "Mileage Book Act," which required railroad companies to issue mileage books and provided a penalty for refusal, was unconstitutional as to railroad corporations in existence at the time of its enactment, because it was an illegal invasion of the vested property rights of such corporations. In *Schnaier v. Navarre Hotel & I. Co.*, 182 N. Y. 88, the court pronounced invalid a statute which provided that it should be unlawful for a copartnership to engage in the business of "employing" or master plumber unless each and every member thereof shall have registered, after examination and certification by an examining board of plumbers. In *People v. Marcus*, 185 N. Y. 257, it was held that a section of the Penal Code was void which provided, in substance, that no person shall make the employment of another, or the continuance of such employment, conditional upon the employé's not joining or becoming a member of a labor organization. In *People v. Williams*, 189 N. Y. 131, 134, this court condemned that part of the Labor Law which prohibited the employment of an adult female in a factory before six o'clock in the morning or after nine o'clock in the evening, and held that it was not a proper exercise of the police power, since it had no reference to the number of hours of labor or to the healthfulness of the employment.

We have yet to consider certain special cases upon

which the exponents of this new law have planted their faith and hope, and these run along such divergent lines as to indicate, more clearly than anything else, the absence of any sound legal theory upon which this legislation can be sustained. These cases are cited in support of the contention that the common law and our statutes furnish many illustrations of legal liability without fault, but we shall endeavor by analysis to show how inapplicable they are to the questions now before the court. The case of *Marvin v. Trout*, 199 U. S. 212, arose under an Ohio statute which subjected premises used for gambling to a lien for money lost in gambling. The statute forbade gambling, and the court very properly argued that: "The power of the State to enact laws to suppress gambling, cannot be doubted, and, as a means to that end, we have no doubt of its power to provide that the owner of the building in which gambling is conducted, who knowingly looks on and permits such gambling, can be made liable in his property which is thus used, to pay a judgment against those who won the money, as is provided in the statute. * * * The liability of the owner of the building to make good the loss sustained, under the circumstances set forth in the statute, was clearly part of the means resorted to by the legislature for the purpose of suppressing the evil in the interests of the public morals and welfare" (p. 224). A more cogent illustration of the undoubted application of the police power cannot be found. In the interest of good morals it is not merely the right but the duty of the State to suppress gambling, and the case, so far from being an authority for the idea of liability without fault, proceeds directly upon the theory that the owner was at

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fault in permitting his premises to be used for an illegal purpose. Then there is the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, in which this court upheld the so-called "Civil Damage Act" which gave to every husband, wife, parent, guardian, employer or other person who should be injured in person or property or means of support by any intoxication of any person, a right of action against any person who by selling or giving away intoxicating liquors caused the intoxication, in whole or in part, and subjecting to the same liability any person or persons owning or renting or permitting the occupation of any building or premises with knowledge that intoxicating liquors were to be sold thereon. In that case, as in the case of *Marvin v. Trout* (*supra*), the controlling principle was that the State had the right to prohibit and, therefore, the absolute right to control. As Judge ANDREWS pertinently observed, "The right of the State to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The State may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication" (p. 517). The defendant in that case, it is true, was not the licensee, but he had rented his premises for the traffic in intoxicating liquors knowing that they were to be so used. Upon that feature of the case Judge ANDREWS said: "The liability imposed upon the landlord for the acts

of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's acts connected with the use of the leased property" (p. 525). That is very far from being a case of liability without fault. The enactment of the "Civil Damage Act" was clearly within the police power, and the liability imposed did not deprive either the tenant or the landlord of "due process of law," for each had the right to his day in court and an opportunity to disprove the facts upon which the statutory right of action depended. Let us suppose, however, that the statute had gone so far as to provide that the mere fact of selling liquor by the tenant, or the mere fact of renting the premises for that purpose by the landlord, should be deemed conclusive proof of the intoxication of the person to whom the liquor was sold, and of the fact that the person bringing the suit had suffered injury thereby, so that the person sued could not be heard to deny or disprove his responsibility for the intoxication or the injuries resulting therefrom. Would that be "due process of law"? Suppose that the Ohio statute, which was also clearly within the general scope of the police power, had imposed upon the landlord a liability for money lost in gambling on his premises without his knowledge of the purpose for which the building was used, and had declared that evidence of the mere loss of the money should be sufficient to sustain a judgment against him. That would clearly be a case of liability without fault; but what court, controlled by constitutional limitations, would render such a judgment? We

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are referred to the case of *Chicago, Rock Island & Pacific Railway Co. v. Zerneck*, 183 U. S. 582, as an illustration of liability without fault. We think that case has no analogy to the case at bar. There a statute of Nebraska imposed upon railroad corporations a liability for all injuries to passengers except when occasioned by the criminal negligence of the person injured, or when the injury was sustained in the violation of some express rule or regulation of the corporation. The point decided in that case was that this rule of liability was a part of the very statute under which the corporation took its charter. The defendant in the case at bar is a railroad corporation, and as such may be subject to state regulations which would not apply to other corporations or to individuals, but we are not now concerned with that question, since the statute before us has reference to employers in their relations with their employés, and not to railroads in their service to the public.

In support of this new statute we are also asked to consider the supposed analogies of the law of deodands; the common-law liability of the husband for the torts of his wife; the liability of the master for the acts of his servant, and the liability of a ship for the care and maintenance of sick or disabled seamen. From the historical point of view, these subjects might be very entertainingly elaborated, but for the practical purposes of this discussion they may be very briefly disposed of. If the law of deodands was ever imported into this country it has never, to our knowledge, found expression in a single statute or judicial decision. It was one of those primitive conceptions of justice under which a chattel which caused the death of a human

being was forfeited to the king. We are unable to see what bearing it can have upon the question whether, under our constitutions, it is due process of law to render a man liable for damages when he has been guilty of no fault. Quite as farfetched seems the argument based upon the common-law liability of the husband for the torts of his wife. Under the common-law unity of husband and wife, the latter was presumed to act under the compulsion of the former; and the wife could never be sued alone. As the marriage vested the husband with the personal property of the wife, it was simply logical that he should pay her obligations. So with the liability of the master for the acts of his servant, the whole theory is expressed in the maxim *qui facit per alium facit per se*. He who acts through another acts himself. How do these illustrations support the principle of liability without fault? Could a husband or master be held liable under the common law when the wife or servant had been guilty of no wrong? Would the common law have denied to the husband or master the right to prove that no tort had been committed by the wife or servant? The admiralty cases of *The Osceola*, 189 U. S. 158; *The City of Alexandria*, 17 Fed. Rep. 399, and the case of *Scarff v. Metcalf*, 107 N. Y. 211, seem to us equally inapplicable as authorities for the proposition that the law recognizes liability without fault. It is common knowledge that the contracts and services of seamen are exceptional in character. A seaman engages for the voyage. He is subject to physical discipline, and exposed to hardships and dangers peculiar to the sea. He is, in effect, a coadventurer with the master, and shares in the risks of shipwreck and capture, often losing his wages by casualties which

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do not affect workmen on land. For these and many other obvious reasons the maritime law has wisely and benevolently built up peculiar rights and privileges for the protection of the seaman which are not cognizable in the common law. When he is sick or injured he is entitled to be cared for at the expense of the ship, and for the failure of the master to perform his duty in this regard, the ship or the owner is liable. That is a right given to the seaman, and a duty enjoined upon the master, by the plainest dictates of justice, which arises out of the necessities of the case; and, because of the reason of the rule, the right and duty cease when the contract has terminated and the seaman has been returned to the port of shipment or discharge, or has been furnished with means to do so. But beyond this duty on the part of the master or owner, there seems to be no liability whatever for injuries sustained by the seaman in the course of his work. We think it may confidently be asserted that within the whole range of the maritime law there will be found no rule which renders master, owner or ship liable in damages for an injury sustained by the seaman without fault on the part of anyone, or without any fault except his own. The case of *Scarff v. Metcalf*, 107 N. Y. 211, was not disposed of upon any such theory, but was based upon the neglect of the master to perform the duty of caring for the injured seaman imposed by the maritime law. The legal status of seamen is clearly illustrated in the case of *Robertson v. Baldwin*, 165 U. S. 275, where it was held that compulsory personal service of a seaman in performance of his contract was not a violation of the Thirteenth Amendment to the Federal Constitution forbidding slavery or involuntary servitude.

In that case the learned justice who wrote for the court suggested that enforced service under a seaman's contract was not involuntary within the Constitution, although the contract would not be enforced by the courts. But in the later case of *Clyatt v. United States*, 197 U. S. 207, it was held that peonage or enforced service, whether under a voluntary contract of service or not, was involuntary servitude and forbidden by the Constitution in all cases save those arising out of the exceptional relations of the seaman to his ship, the child to its parents and the apprentice to his master. In the review in *Robertson v. Baldwin* (*supra*), of the various decisions in admiralty, it is made quite clear that the courts have always regarded seamen as irresponsible to a degree which makes them incapable of fully protecting their own rights. With the power given to the employer of seamen to compel specific performance of their contracts, there are imposed certain obligations unknown to any other relation. It is a relation which rests on affirmative law and not on natural right. We can find no analogy between a case arising out of such a relation and one in which an adult of sound mind and capable of freely contracting for himself voluntarily enters upon employment from which he is at liberty to withdraw whenever he will.

Great reliance is placed upon the case of *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, in support of the contention that there may be liability where there is no delinquency. That was an action brought by an owner of land adjoining the defendant's railroad to recover damages for the destruction of his dwelling house and other buildings, caused by fire which spread from sparks emitted by the defendant's locomotives.

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The action was brought under a statute of the State of Missouri which provided that "each railroad corporation, owning or operating a railroad in this State, shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad owned or operated by such railroad corporation; and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf, for its protection against such damages." The statute was upheld as being within the legislative power of the State. That decision is amply supported by a number of reasons which have no application to the controversy at bar. To begin with, the constitution of Missouri contained a clause, which was in force when the railroad company obtained its charter, providing that "the exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State." Missouri Const., article 12, § 5. Another ample reason is found in the fact that railroads alone "have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss." *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447. Then, again, "the right to use the

agencies of fire and steam in the movement of railway trains is * * * derived from the legislation of the State, and it certainly cannot be denied that it is for the State to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control." *Hartford F. Ins. Co. v. Chi., Mil. & St. Paul Ry. Co.*, 62 Fed. Rep. 904. A legislature may, if it chooses, make it a condition of the right to run carriages propelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which fire may cause. *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438; *Grand Trunk Ry. Co. v. Richardson*, 9 U. S. 454. And, finally, these statutes are designed to protect the rights of those who have no contractual relations to the corporations which inflict the injury. In such a case, when both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of the dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property who has no control over or interest in these instruments. Quite aside from the considerations which support such a statutory liability against railroad corporations, it may be added that it is in no sense an extension of the rule of the common law to modern conditions, but in reality a return to the original common-law doctrine under which every person who permitted fire started by him to escape beyond his house or close was liable to every

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one who suffered loss or injury thereby. The severity of that early English rule was moderated by numerous statutes, among which are 6 Anne and 14 Geo. III. As to these two last-mentioned statutes it has been held that they became by adoption a part of the common law of this State (Thompson's Negligence, vol. 1, pp. 148 *et seq.*, notes under "Liability for Damages by Fire," and *Webb v. R., W. & O. R. R. Co.*, 49 N. Y. 420, 426), under which neither individuals nor corporations are liable for escaping fire unless there is negligence. *Clark v. Foot*, 8 Johns. 421; *Bennett v. Scutt*, 18 Barb. 347, 349; *Stuart v. Hawley*, 22 Barb. 619, 621; *Radcliff's Exrs. v. Mayor, etc., of Brooklyn*, 4 N. Y. 195, 200; *Calkins v. Barger*, 44 Barb. 424; *Sheldon v. Hudson R. R. Co.*, 14 N. Y. 219; *Steinweg v. Erie Ry.*, 43 N. Y. 123, 127. The cited cases arising out of injuries inflicted by animals of known dangerous or vicious propensities, and the liability which has often been imposed for the maintenance of private nuisances, we shall not discuss, for we think they are governed by well-settled principles which clearly have no application to the questions now before us.

In the addenda to the instructive brief of the counsel for the commission our attention is called to three decisions of the Federal Supreme Court which have been but recently decided and are not yet officially reported. *Noble State Bank v. Haskell*, 219 U. S. 104; *Assaria State Bank v. Dolley*, 219 U. S. 121, and *Engel v. O'Malley*, 219 U. S. 128. These cases, it is contended, strongly support the validity of the legislation which we are condemning because, as counsel asserts, they go directly to the ultimate question: "Is the act an unreasonable regulation of the *status* of employment?" We have

tried to make it clear that in our judgment this statute is not a law of regulation. It contains not a single provision which can be said to make for the safety, health or morals of the employés therein specified, nor to impose upon the enumerated employers any duty or obligations designed to have that effect. It does not affect the *status* of employment at all, but writes into the contract between the employer and employé, without the consent of the former, a liability on his part which never existed before and to which he is permitted to interpose practically no defense, for he can only escape liability when the employé is injured through his own willful misconduct. That is a defense which needs no legislative sanction, since it would be abhorrent to the most primitive notions of justice to permit one to impose liability for his willfully self-inflicted injuries upon another who is wholly free from responsibility for them. The case of *Engel v. O'Malley* (*supra*) is so clearly distinguishable from the case at bar that we need only state the facts to mark the contrast. The *Engel* case arose under a New York statute which provides that individuals and firms shall not engage in the business of receiving deposits for safe-keeping or for transmission, or for any other purpose, or in the business of banking, without first obtaining from the state comptroller a license. The same statute further provides that applicants for such a license must pay a prescribed fee, give bonds and submit to other restrictions. We have already passed upon the constitutionality of certain parts of that statute (Laws of 1907, Chapter 185) in *Musco v. United Surety Co.*, 196 N. Y. 459, which was an action upon a bond given under it, and have held that "the regulation of the busi-

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ness of receiving deposits is plainly within the power possessed by the State to regulate the conduct of various pursuits when necessary for the protection of the public" (p. 465). The portion of the statute under consideration in the last-cited case was plainly directed against an obvious evil which vitally affected the public welfare. The city of New York is the gateway through which this country admits each year thousands of poor and ignorant immigrants who deal with individuals and firms engaged in the business of exchanging domestic for foreign money, receiving deposits and transmitting remittances to foreign ports. It is a business which may, and probably does, attract some irresponsible and mercenary adventurers. A law designed to regulate and safeguard such a business in a way which affects no constitutional property rights, is plainly within the police power of the State. That is all that was involved in the *Musco* case, and that is the extent to which this court has passed upon the constitutionality of the New York statute. Laws of 1907, Chapter 185. It need hardly be argued that a law passed under the guise of such a purpose, but having in fact no relation to it, and accomplishing nothing to make the business of receiving deposits more safe, would be as far beyond the sphere of the police power as an amendment to the Banking Law requiring banks and bankers to protect their customers, to whom they pay moneys, against thefts or other physical losses thereof; or an amendment to the Labor Law which would compel the industrial employers to give each employé a vacation on full pay during two months of every year.

As to the cases of *Noble State Bank v. Haskell*, 219 U. S. 104, and *Assaria State Bank v. Dolley*, 219 U. S.

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121, we have only to say that if they go so far as to hold that any law, whatever its effect, may be upheld because by the "prevailing morality" or the "strong and preponderant opinion" it is deemed "to be greatly and immediately necessary to the public welfare," we cannot recognize them as controlling of our construction of our own constitution. That the business of banking in the several States may be regulated by legislative enactment is too obvious for discussion. That the extent to which such state regulation may be carried must depend upon the difference in constitutional provisions is also plain. How far these late decisions of the Federal Supreme Court are to be regarded as committing that tribunal to the doctrine that any citizen may be deprived of his private property for the public welfare we are not prepared to decide. All that it is necessary to affirm in the case before us is that in our view of the constitution of our State, the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void.

The judgment of the Appellate Division should be reversed and judgment directed for the defendant, with costs in all courts.

CULLEN, Ch. J.:

I concur in the opinion of Judge WERNER for reversal of the judgment appealed from. I concede that the legislature may abolish the rule of fellow servant as a defense to an action by employé against the employer. Indeed, we have decided that in upholding the so-called Barnes Act. *Schradin v. N. Y. C. & H. R. R. R. Co.*, 194 N. Y. 534. I concede that the legislature may also

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abolish as a defense the rule of assumption of risk and that of contributory negligence unless the accident proceeds from the willful act of the employé. I concede that in a work, occupation, or business of such a nature that the legislature might prohibit its pursuit or exercise altogether, the legislature may prescribe terms under which it may be carried on. Plainly, this litigation does not present such a case. The legislature could not revoke the franchise it had previously given to the defendant to operate a railroad. *People v. O'Brien*, 111 N. Y. 1. I am not prepared to deny that where the effects of the work, even though prosecuted carefully, go beyond a person's own property and injure third persons in no way connected therewith, the person for whose account the work is done may be held liable for injuries occasioned thereby. I also concede the most plenary power in the legislature to prescribe all reasonable rules for the conduct of the work which may conduce to the safety and health of persons employed therein. But I do deny that a person employed in a lawful vocation, the effects of which are confined to his own premises, can be made to indemnify another for injury received in the work unless he has been in some respect at fault. I am not impressed with the argument that "the common law imposed upon the employé entire responsibility for injuries arising out of the necessary risks or dangers of the employment. The statute before us merely shifts such liability upon the employer." It is the physical law of nature, not of government, that imposes upon one meeting with an injury, the suffering occasioned thereby. Human law cannot change that. All it can do is to require pecuniary indemnity to the party injured, and I know of no principle

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on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault. It might as well be argued in support of a law requiring a man to pay his neighbor's debts, that the common law requires each man to pay his own debts, and the statute in question was a mere modification of the common law so as to require each to pay his neighbor's debts. It is urged that the legislation before us can be upheld on the decision of the Supreme Court of the United States in *Noble State Bank v. Haskell*, 219 U. S. 104. In support of the claim there is cited from the opinion the following: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 519. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare" (p. 111). It is possible that the doctrine of these two sentences would justify the statute before us and possibly any legislation, if only supported by a sufficient popular demand, but it is both unfair and unsafe to excerpt fragmentary sentences from the opinion of a court and interpret them apart from the context of the whole opinion. However that may be, the decision in the *Noble Bank* case is not controlling upon this court in the construction of the constitution of our own State, and I am not disposed to accept it, at least, until it has received the approval of a majority of the court. I concur with Judge WERNER that the act, as applicable to the case before us, cannot be considered as an exercise of the power of the State to regulate corporations. The act is general, not confined to corporations, and even if it were, I think its

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effect would be a deprivation of property not authorized by the reserved power to regulate.

As to corporations hereafter formed, the question is very different. The franchise to be a corporation is not one inherent in the citizen, but proceeds solely from the bounty of the legislature, and for that reason the legislature may dictate the terms on which it will be granted and require the acceptance of the provisions of this act as a condition of incorporation. *Purdy v. Erie R. R. Co.*, 162 N. Y. 42; *Minor v. Erie R. R. Co.*, 171 N. Y. 566; *People ex rel. Schurz v. Cook*, 110 N. Y. 443; s. c., 148 U. S. 397; *Chicago, R. I. & Pac. R. Co. v. Zerneck*, 183 U. S. 582. Even in the case of existing corporations, the corporate existence of all those created since the constitution of 1846 may be revoked by the legislature, though the property rights of such corporations and their special franchises other than the one to be a corporation cannot be impaired. Const., article VIII, § 1; *Lord v. Equitable Life Assur. Soc.*, 194 N. Y. 212. The property and franchise would have to be managed by the owners as partners or tenants in common, and the legislature might require as a condition of the continued right to be a corporation that before the expiration of a reasonable period the provisions of the statute should be accepted also by them. They are in the condition of a tenant at will who, when the landlord raises the rent, must either comply with his terms, or, after the expiration of a reasonable time prescribed by a notice to quit, surrender his rights under the lease. But individual citizens, following the ordinary vocations of life, asking no favors of the government, whether a corporate or other franchise, but only the protection of life and property, which every

government owes to its citizens, and guilty of no fault, cannot be compelled to contribute to the indemnity of other citizens who, by misfortune or the fault of themselves or others, have suffered injuries, except by the exercise of the power of taxation imposed on all, at least all of the same class, for the maintenance of public charity. Of course, I am not now referring to obligations springing from domestic relations.

CULLEN, Ch. J., GRAY, HAIGHT, WILLARD BARTLETT, CHASE and COLLIN, JJ., concur with WERNER, J.; CULLEN, Ch. J., also files an opinion, with whom WILLARD BARTLETT, J., concurs.

Judgment reversed, etc.

OPINIONS OF JUSTICES ¹ AS TO CONSTITUTIONALITY OF
HOUSE BILL No. 2154; SENATE No. 615

(209 Mass. 607)

Constitutional law; Workmen's Compensation Act; taking property without due process of law

1. The rules of law relating to contributory negligence and assumption of risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the legislature may change them or do away with them altogether, as defenses, as in its wisdom in the exercise of powers intrusted to it by the Constitution it deems will be best for the "good and welfare of this Commonwealth."

¹ Massachusetts has a law permitting the submission of the question of the constitutionality of a proposed law to the Supreme Court before it is enacted. The decision in the text was rendered pursuant to this law.

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2. There is nothing unconstitutional in the provision of the Compensation Act that it shall not apply to domestic servants and farm laborers, nor in the provision that an employé shall be deemed to have waived his right of action at common law if he shall not have given notice to his employer as in the act provided.
3. As the Compensation Act does not contain any legal compulsion to an acceptance by an employer or an employé of the provisions for compensation in lieu of damages, it is not in conflict with the Fourteenth Amendment of the Federal Constitution prohibiting the taking of property without due process of law, and constitutes a valid exercise of the power of the legislature of the commonwealth of Massachusetts.

THE COMMONWEALTH OF MASSACHUSETTS

To the Honorable the Senate of the Commonwealth of Massachusetts:

We have received the questions, of which a copy, with the act referred to therein and the amendment adopted by the Senate, is hereto annexed, and after giving to them such consideration as we have been able to give in the time at our disposal, we respectfully answer them as follows.

The questions submitted to us are important, and the proposed act involves a radical departure in the manner of dealing with actions or claims for damages for personal injuries received by employés in the course of their employment from that which has heretofore prevailed in this commonwealth; but we think that nothing would be gained by an extended discussion and we therefore content ourselves with stating briefly the conclusions to which we have come and our reasons therefor.

The first section of the act (Part I, § 1) provides that "In an action to recover damages for personal injury sustained by an employé in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employé was negligent;

"2. That the injury was caused by the negligence of a fellow employé;

"3. That the employé had assumed the risk of the injury."

This section deals with actions at common law. We construe clauses 1 and 2 in their reference to negligence as meaning contributory negligence or negligence on the part of a fellow servant which falls short of the serious and willful misconduct which under Part II, § 2, will deprive an employé of compensation. So construed we think that the section is constitutional. We neither express nor intimate any opinion whether it would be unconstitutional if otherwise construed. The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the legislature may change them or do away with them altogether as defenses (as it has to some extent in the Employers' Liability Act) as in its wisdom in the exercise of powers intrusted to it by the Constitution it deems will be best for the "good and welfare of this Commonwealth." See *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minnesota Iron Co. v. Kline*, 199 U. S. 593. The act expressly provides that it shall not apply to injuries sustained before it takes effect. If, therefore, a right of action which has accrued under existing laws for personal

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injuries constitutes a vested right or interest, there is nothing in the section which interferes with such rights or interests. The effect of the section is not to authorize the taking of property without due process of law, as the Court of Appeals of New York held was the case with the statute referred to in the preamble to the questions submitted to us, and which in consequence thereof was declared by that court to be unconstitutional. *Ives v. South Buffalo Railway*, 201 N. Y. 271. Construing the section as we do, and as we think that it should be construed, it seems to us that there is nothing in it which violates any rights secured by the state or Federal constitutions. We see nothing unconstitutional in providing, as is done in Part I, § 2, that the provisions of § 1 shall not apply to domestic servants and farm laborers; nor in providing, as is done in Part I, § 5, that the employé shall be deemed to have waived his right of action at common law if he shall not have given notice to his employer as therein provided. The effect of the provisions referred to is to leave it at the employé's option whether he will or will not waive his right of action at common law. See *Foster v. Morse*, 132 Mass. 354.

The rest of the act deals mainly with a scheme for providing, through the instrumentality of a corporation established for that purpose entitled the Massachusetts Employés' Insurance Association, and the subscription of employers thereto, for compensation to employés for personal injuries received by them in the course of their employment, and not due to serious and willful misconduct on their part. There is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employé to waive

his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly so far as the employer is concerned from the New York statute above referred to. By subscribing to the association an employer voluntarily agrees to be bound by the provisions of the act. The same is true of an employé who does not choose to stand upon his common-law rights. An employer who does not subscribe to the association will no longer have the right in an action by his employé against him at common law to set up the defense of contributory negligence or assumption of the risk, or to show that the injury was caused by the negligence of a fellow servant. In the case of an employé who does not accept the compensation provided for by the act and whose employer had become a subscriber to the association, an action no longer can be maintained for death under the Employers' Liability Act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights. We do not deem it necessary to take up and consider in detail the numerous provisions by which the right to compensation and the amount thereof and the persons entitled thereto and the course of procedure to be followed and matters relating thereto are to be settled and determined. We assume, however, that the meaning of §§ 4 and 7 of Part III of the proposed act is that the approved agreement or decision therein mentioned is to be enforced by proper proceedings in court, and not by process to be issued by the Industrial Accident Board itself. Taking into account the noncompulsory character of the proposed act, we see nothing in any of these provisions which is not "in conformity with" the Fourteenth Amendment

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to the Federal Constitution or which infringes upon any provision of our own constitution in regard to the taking of property "without due process of law." It is within the power of the legislature to provide that no agreement by an employé to waive his rights to compensation under the act shall be valid. See *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minnesota Iron Co. v. Kline*, 199 U. S. 593.

In regard to the amendment it is to be observed that no liability insurance company is obliged to insure, and that if it chooses to do so there is nothing unconstitutional in requiring that it and the policy holder shall be governed by the provisions of the act so far as applicable.

It should be noted perhaps in the interest of accuracy that there is no phrase in our constitution which in terms requires that "property shall not be taken from a citizen without due process of law." The quoted words, which we take from the first question submitted to us, are a paraphrase of what is contained in the constitution, but are not the language of the constitution itself.

We have confined ourselves to the questions submitted to us, and we answer both of them in the affirmative.

Owing to their absence from the commonwealth, the CHIEF JUSTICE and Mr. Justice LORING have taken no part in the consideration of the questions.

JAMES M. MORTON.

JOHN W. HAMMOND.

HENRY K. BRALEY.

HENRY N. SHELDON.

ARTHUR PRENTICE RUGG

July 24, 1911.

EDWARD G. BORGNIS v. FALK COMPANY

(00 Wis. 000, 133 N. E. Rep. 209)

Constitutional law; Workmen's Compensation Act; classification of employments; public policy; abolishing common-law defenses; coercing employers to accept compensation principle; industrial commission not a court; violating obligation of contract

1. Where a constitution contains on a particular subject no express command but only general language or policy, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic and governmental conditions and ideals of the time as well as the problems which the changes have produced, must also logically enter into the consideration and become influential factors in the settlement of problems of constitutional interpretation.
2. The term "public policy" is frequently used very vaguely, and evidently is so used in the Compensation Law. It is, however, quite a definite thing. Public policy on a given subject is determined by the Constitution itself or by statutes passed within constitutional limitations. Only in the absence of such constitutional or statutory determination may it be determined by the decisions of the courts.
3. The classification of employers into those who do and those who do not elect to come under the compensation feature of the statute and giving to each different rights and remedies is not unlawful
4. The provision of the statute making it applicable only to employers who employ four or more workmen does not constitute an unlawful classification.
5. The provision that if one section or portion of the law shall be declared to be invalid other portions shall not be affected, or shall be affected in a particular way, is not unconstitutional.

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6. There is no greater right to abolish the common-law defenses as applicable to actions growing out of injuries in the hazardous industries than there is to abolish those defenses in relation to the nonhazardous occupations.
7. The statute is not unconstitutional as coercing employers to accept its provisions by abolishing their common-law defenses if they refuse to elect to be bound by the compensation principle.
8. The Industrial Commission is not a court within the meaning of article 7, § 16, of the constitution of Wisconsin and therefore the statute creating such commission is not unconstitutional.
9. The right to bring an action in the future for a tort not yet committed can in no way affect the contract of employment between an employer and his employes, and, therefore, the Compensation Act is not unconstitutional as violating the obligation of the contract between an employer and his workmen.

Appeal from Circuit Court, Milwaukee County;
W. J. TURNER, Judge.

Suit by Edward G. Borgnis and others against the Falk Company, to restrain defendant from adopting the Workmen's Compensation Law (Laws of 1911, Chapter 50) during the continuance of complainants' contracts of employment. From a decree in favor of complainants, defendant appeals. Reversed and remanded, with directions.

It appears by the complaint that the defendant is a manufacturing corporation in Milwaukee, employing at its shops many workmen, among whom are the plaintiffs; the plaintiff Borgnis is the superintendent of one of the departments in the defendant's establishment at a salary of \$2,000 per year, under a contract

extending some time in the future; the plaintiff Schumacher is an infant 17 years of age, employed under an apprenticeship contract which has yet nearly three years to run. The complaint further alleges that the defendant threatens to file an election to become subject to the provisions of Chapter 50 of the Session Laws of 1911, known as the "Workmen's Compensation Law"; that such election will compel the plaintiffs severally to withdraw from their said contracts or to submit to the provisions of said act; and that hence said election will thus work irreparable injury to the plaintiffs, for which they have no adequate remedy at law. The prayer is that the defendant be enjoined from filing such election during the continuance of the contracts. By answer the defendant admitted the allegations of the complaint, except the allegations of irreparable injury and absence of an adequate remedy at law, which were denied, and as an affirmative defense alleged that the act in question was null and void, because it violates a number of specified articles of the Constitutions of the State and of the United States, and hence that the defendant's election to become subject to the act could not possibly work any injury to the plaintiffs. Upon motion, judgment was entered upon the pleadings enjoining the defendant from electing to become subject to the act during the continuance of the plaintiffs' contracts, and the defendant appeals.

Carpenter & Poss, for appellant.

Arthur Breslauer and *Michael Levin*, for respondents.

L. H. Bancroft, Attorney General, and *Russell Jackson*, Deputy Attorney General, for the State.

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C. H. Crownhart, Joseph D. Beck and John R. Commons, Industrial Commission of Wisconsin, pro se.

WINSLOW, C. J. (after stating the facts as above):

We are not certainly advised as to the exact ground on which the decision below was reached, but we assume that it was on the theory that the law in question was a valid law; that it was retrospective in its effect, and that if the defendant elected to become subject to the act the plaintiffs would be compelled to breach their existing contracts or submit to the terms of the act, and thus lose valuable rights; and hence that equity might and should restrain their employer from electing to come under the law until their existing contracts had expired.

It seems to be true that this action might very well be disposed of without considering the question of the validity of the act in question. Ordinarily under such circumstances that course would be the proper one to pursue, for the question of the constitutionality of a statute passed by the legislature is not one to be lightly taken up, and generally such a question will not be decided unless it be necessary to decide it in order to dispose of the case. There are circumstances here present, however, which seem to call very loudly for immediate consideration of the question of the validity of the act in question, if under any view of the case it can be considered as involved. The legislature, in response to a public sentiment which cannot be mistaken, has passed a law which attempts to solve certain very pressing problems which have arisen out of the changed industrial conditions of our time. It has endeavored by this law to provide a way by which em-

ployer and employed may, if they so choose, escape entirely from that very troublesome and economically absurd luxury known as "personal injury litigation," and resort to a system by which every employé not guilty of willful misconduct may receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules, without a lawsuit and without friction.

A considerable number of employers have accepted the terms of the act, but unquestionably many are waiting until the question of the constitutionality of the act be authoritatively settled by this court. Nor is this attitude either blameworthy or surprising. If an employer elects to accept the act and proceeds to pay out the sums which it requires for a year or more, and then the act should be declared unconstitutional, it might well be that he would have paid out considerable sums which under the former system he would not be required to pay at all, because he was not negligent, and that he would also be subject to suits to recover additional sums by those who, without contributory negligence, had suffered injury and had received compensation under the law. The situation is unquestionably one of much doubt and uncertainty among the great industries of the State, and it must remain such until this court has spoken. Many employers of labor who have not accepted the law have taken that course, not because they have chosen definitely to decline the terms of the law, but because they do not know whether they will be protected if they accept and act under it. Such a condition of uncertainty ought not to be allowed to exist, if it can be removed. This court cannot properly decide questions which are not legitimately in-

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volved in *bona fide* lawsuits, but it may properly decide all questions which are so involved, even though it be not absolutely essential to the result that all should be decided. The validity of the statute in question is a matter which may be legitimately considered in the decision of this case. If the statute be unconstitutional and void, then it is certain that the plaintiffs have no cause of action, because an election to accept the terms of a void statute could harm no one. Impressed with this view of our duty under the circumstances, we advanced the present case upon the calendar, and invited argument upon the main question as to the constitutionality of the statute, not only from the Attorney General on behalf of the State, but from any attorney interested in the question. In pursuance of this invitation the Attorney General and the Industrial Commission filed briefs, and oral argument was made by the Deputy Attorney General. The case has been fully presented, therefore, both by brief and argument, and we are now to consider whether there be any solid foundation for the attack made upon the law. In undertaking this task it will be necessary first to set forth in some detail its fundamental provisions.

It adds thirty-two new sections to the statutes, the first eight of which sections are as follows: (The court here sets forth the first eight sections of the statute.)

By a later act passed at the same session of the legislature (Chapter 485, Laws of 1911) an Industrial Commission, composed of three members, was created, which, among numerous other duties, is required to perform all the duties vested in the Industrial Accident Board aforesaid, and thus the last-named board has passed

out of existence. *In re Filer & Stowell Co.* (present term), 132 N. W. 584. The act is quite long, as the complicated and delicate subject with which it deals manifestly requires, but its general purport and effect so far as this case is concerned may be briefly summarized:

It creates an administrative board to carry its provisions into effect. It divides all private employers of labor into two classes: (1) Those who elect to come under the law; and (2) those who do not so elect. It takes away the defenses of assumption of risk, and negligence of a coemployé from the second class (except that where there are less than four coemployés the latter defense is not disturbed), but leaves both defenses intact to the first class. It prescribes the manner in which an employer may elect to come under its terms, and how an employé may make his election, and when silence on the part of the employé will be considered an election; but it does not in terms compel either employer or employé to submit to its provisions. It then provides a comprehensive scheme by which, after both parties have so elected, any substantial injury, whether the result be fatal or not, received by the employé in the course of or incidental to his employment (except those caused by willful misconduct) shall be compensated for by the employer according to certain definite rules, which rules are to be administered by the administrative board aforesaid by means of simple procedure definitely laid down, which gives to both parties fair notice and hearing, and results in findings and an award which may be filed in the Circuit Court and become a judgment. It further provides that the findings of fact shall be conclusive and the

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award subject to review only by action in the Circuit Court of Dane County, in which it can be set aside only (1) If the commission acted without or in excess of its powers; (2) if the award was procured by fraud; or (3) if the award is not supported by the findings of fact. It then provides that the judgment thus rendered shall be subject to appeal to the Supreme Court.

For all the essential purposes of this discussion, it may truly be said that this is the law which is before us, and the question is simply whether there is any vital part of it which the legislature may not enact because the Constitution forbids it. It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers, as well as laymen, that the personal injury action brought by the employé against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop, with few employés, and the stagecoach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones; but they were relatively few, and the employé who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying, with constantly swelling ranks marching with halting

step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers' common-law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty.

In approaching the consideration of the present law, we must bear in mind the well-established principle that it must be sustained, unless it be clear beyond reasonable question that it violates some constitutional limitation or prohibition. That governments founded on written constitutions which are made difficult of amendment or change lose much in flexibility and adaptability to changed conditions there can be no doubt. Indeed that may be said to be one purpose of the written constitution. Doubtless they gain enough in stability and freedom from mere whimsical and sudden changes to more than make up for the loss in flexibility; but the loss still remains, whether for good or ill. A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the

problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress.

Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present day people and conditions? When an eighteenth-century constitution forms the charter of liberty of a twentieth-century government, must its general provisions be construed and interpreted by an eighteenth-century mind in the light of eighteenth-century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the State upon a veritable bed of Procrustes.

Where there is no express command or prohibition, but only general language or policy to be considered,

the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation. These general propositions are here laid down, not because they are considered either new or in serious controversy, but because they are believed to be peculiarly applicable to a case like the present, where a law which is framed to meet new economic conditions and difficulties resulting therefrom is attacked principally because it is believed to offend against constitutional guaranties or prohibitions couched in general terms, or supposed general policies drawn from the whole body of the instrument.

Passing to the consideration of the contentions made in the present case, we note *in limine* that this is not a compulsory law. No employer is compelled to pay damages to an employé without having had his day in court. It is true that the argument is made that the law is practically coercive; but that argument is not regarded by us as sound, and will be taken up and treated later in this opinion. We are therefore relieved from all consideration of the question whether a compulsory compensation act offends against those clauses of the state and Federal constitutions which guarantee all citizens against the deprivation of property without due process of law. This would be a question of greater difficulty than those which are presented in the present case. It was decided in the affirmative by the Court of Appeals of New York

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(*Ives v. S. B. Ry. Co.*, 201 N. Y. 271; 94 N. E. 431), and in the negative by the Supreme Court of Washington [*State ex rel. Clausen* (Sept. 27, 1911), 117 Pac. 1101], and we express no opinion upon it.

The contention which naturally seems to come first in order is the objection that the whole first section, abolishing the defenses of assumption of risk and negligence of a fellow servant, is void, because, as it is said, public policy does not require their abrogation in any but the hazardous trades; it being admitted that in these last-named trades these defenses may properly be abolished.

The term "public policy" is frequently used very vaguely, and evidently is so used here. It is, however, quite a definite thing. Public policy on a given subject is determined either by the Constitution itself or by statutes passed within constitutional limitations. In the absence of such constitutional or statutory determination only may the decisions of the courts determine it. *Hartford Ins. Co. v. C., M. & St. P. Ry. Co.*, 70 Fed. Rep. 201; 17 C. C. A. 62; 30 L. R. A. 193; s. c., 175 U. S. 91; 20 Sup. Ct. 33; 44 L. Ed. 84. This court has said: "We know of no ground upon which a constitutional legislative enactment can be rightly spoken of as contrary to public policy." *Julien v. Model B. L. & I. Assn.*, 116 Wis. 79; 92 N. W. 561; 61 L. R. A. 668. And the remark is certainly correct. When acting within constitutional limitations, the legislature settles and declares the public policy of a State, and not the court. True, where the legislature has not spoken on a subject, and the courts in the course of their duty have declared the principle of common law applicable thereto, public policy may be truly said to

be thus created; but any public policy thus created by the courts may be at any time reversed or changed by the legislature, provided it act within constitutional lines. The people, acting directly by means of a referendum, or through their representatives in constitutional conventions or legislative bodies, are the makers of public policy, and it is only when the people have failed to speak in these methods that the courts can be said to have power to make public policy by decision. A constitutional statute cannot be *contrary* to public policy—it is public policy.

The contention that a statute is unconstitutional because it is against public policy amounts to nothing more than a contention that it is unconstitutional; hence we address ourselves directly to that question and thereby gain something in clearness of thought.

The two defenses which the legislature has thus attempted to take away are not intrenched behind any express constitutional provision, nor were they originally created by legislative action. They were both evolved by the courts. At a time when industries of all kinds were comparatively simple and free from danger, when employés of a common master were few in number and generally acquainted with each other, and when a personal injury action was a rarity, it was thought not to be unreasonable that an employé should assume those simple risks which were plainly before him, and should not be heard to complain if he were injured by the careless act of a fellow workman by whose side he had continued to work when he must have well known the nature and habits of the man. The precedent once made was generally followed, until it became buttressed by a multitude of decisions in

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practically all of the jurisdictions whose jurisprudence is founded upon the English common law. But, as has been pointed out earlier in this opinion, the conditions surrounding employer and employed have vastly changed during the last half century, and now the legislature, having become convinced that new conditions call for a change in rules of liability, have declared that such a change shall be made. They have changed the rule established by the courts, because they deem another rule better fitted to deal with the problems of the time, or, in other words, because they deem it best to establish a changed public policy.

It is frankly admitted by appellant that it is within the legislative power to make this change with regard to the hazardous trades, but not with regard to what are called the nonhazardous trades. But why not? There are, of course, some occupations which are exceptionally hazardous, and it may well be that it would be within legislative discretion to classify these very hazardous occupations and remove the defenses as to them, while retaining them as to others less hazardous. Indeed, that very thing has been done and has been approved by the courts in this and many other States, especially in the case of railroads and to some extent with other industries. *M. I. Co. v. Kline*, 199 U. S. 593; 26 Sup. Ct. 159; 50 L. Ed. 322; Stats. Wis., § 1816, as amended by Chapter 254, Laws of 1907; *Kiley v. C., M. & St. P. Ry. Co.*, 142 Wis. 154; 125 N. W. 464; Stats. Wis., §§ 1636j-1636jj (Chapter 303, Laws of 1905).

But because there is room for classification it does not follow that legislation without classification is unconstitutional. There are hazards in all occupations;

indeed, they follow every man from the cradle to the grave. What constitutional requirement, either expressed or implied, clothes these court-made defenses with exceptional sanctity as to the less hazardous industries and warns off from them the sacrilegious hand of the legislature? We are referred to none, and we know of none. It is admitted in the *Ives* case, *supra*, that both the fellow-servant defense and the contributory negligence defense, being of judicial origin, may be changed or abolished by the legislature. See, also, *Opinion of the Justices of the Massachusetts Supreme Judicial Court on the Personal Injuries Act of 1911*, 209 Mass. 607, 96 N. E. 308. We see absolutely no ground for the contention that these defenses may be lawfully abrogated as to the more hazardous industries, but must be forever held sacred as to the less hazardous industries. There may be a less persuasive reason for the change in the case of the latter class of industries but this does not deprive the legislature of the power to make it.

But it is said that there is no proper classification here, and hence that the law is fatally discriminating in its character. The two defenses are preserved intact to employers who elect to come under the law and taken away from those who do not so elect. The rules governing classification are familiar and are in brief as follows: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only and must apply equally to each member of the class. It seems to us that this classification fully meets these requirements; certainly there will be very real differences between the situation of

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the employer who elects to come under the law and the employer who does not. If the consenting employer only employs workmen who also elect to come under the law, he can never be mulcted in heavy damages, and will know whenever an employ   is injured practically just what must be paid for the injury. Surely this is a different situation from the situation of the man who is liable to be brought into court by an injured employ   at any time and obliged to defend common-law actions upon heavy claims unliquidated in their character, the outcome of which actions none can foretell. On the other hand, if, as seems quite likely, the greater part of the consenting employer's workmen consent, but some do not, and these latter are still retained in the employment, the same considerations will apply with somewhat less force. On the one hand, there is a class of consenting employers employing wholly or largely consenting workmen, and having definite and fixed obligations to their workmen in case of injury; on the other hand is a class of nonconsenting employers who have no such fixed obligations in case of injury to their workmen, but choose to meet every such workman in court and fight out the question of liability. There seems a very robust difference between these two classes. But after all there is another distinction which seems perhaps more satisfactory. The consenting employer has done his share, and it must be considered a considerable share, in rendering successful the legislative attempt to meet and solve a difficult social and economic problem. Even if it be true (which, as before stated, is not decided) that he may not be compelled under our constitutions, state and national, to assist in the solution of this problem, still does not

his voluntary act in giving that assistance constitute a substantial distinction, making a real difference of situation between him and the employer who refuses his aid—a difference which justifies a difference in treatment?

It seems to us that this question must be answered in the affirmative, and if it be so answered there can be no doubt as to the legitimacy of the classification, for the reason that it is quite apparent that the other conditions of valid classification are fully satisfied. There can be no doubt that the classification is germane to the purpose of the law, and it is not limited in its application to existing conditions only, and applies equally to each member of the class.

The minor classification by which the fellow-servant defense is preserved to all employers employing less than four employes in a common employment is also attacked as having no proper legal basis; but it seems to us that the grounds of classification here are more persuasive even than in the case just discussed. The man who is employed with one or two other men in a given employment in all reasonable probability knows their characteristics well, and will probably be with them a great part of the time. He will have ample opportunity to form a just judgment as to the risk of injury from their negligence which he will run if he works with them, and will be enabled to shape his own conduct accordingly; but the man who is one of a large number of men, many of whom he never sees, and some of these latter having duties to perform in distant places upon the due performance of which his own safety depends, has no opportunity to acquire any accurate knowledge of the characteristics of many of

his fellow workmen, and cannot intelligently decide what risk he runs at the hands of such distant and unknown employés. The difference in situation is not merely fanciful; it is real. In one case, the employé knows or has the means of knowing what to expect from his colaborers; in the other case, he has neither the knowledge nor the means of knowledge. Of course, there will be cases on the border line, where the difference in situation will be very slight, or perhaps entirely nonexistent. There will probably be no practical difference between the situation of the man who is one of four or five employés in a given employment and the situation of the man who is one of three; but this does not militate against the legitimacy of the classification. This is a necessary defect in all cases of classification based upon numbers. The question is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there "is a distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them." *State v. Evans*, 130 Wis. 381; 110 N. W. 241.

Passing from these questions of classification, we meet the objection that the law, while in its words presenting to employer and employé a free choice as to whether he will accept its terms or not, is in fact coercive, so that neither employer nor employé can be said to act voluntarily in accepting it. As to the employer, the argument is that the abolition of the two defenses is a club which forces him to accept; and as to the employé, the argument is that if his employer

accepts the law the employé will feel compelled to accept also, through fear of discharge if he do not accept.

Both of these arguments are based upon conjecture. Laws cannot be set aside upon mere speculation or conjecture. The court must be able to say with certainty that an unlawful result will follow. We do not see how any such thing can be said here. No one can say with certainty what results will follow in the practical workings of the law. It may well be that many manufacturers, especially those employing small numbers of employés and in the less dangerous trades, will deliberately conclude that it will be better business policy to exercise greater care in guarding their employés from possible danger and greater discrimination in the employment of careful men, and reject the law entirely, running the risk of being able to prevent all or nearly all accidents. It seems extremely probable that the great bulk of workmen, especially of the unskilled classes, will be glad to come under the act and thus secure a certain compensation in case of injury, in place of that very uncertain and expensive thing, namely, the final result of a lawsuit; but whether this be so or not, it may be considered as reasonably certain that very many will elect to come under the act voluntarily and freely, and that those who do not will probably come from the ranks of skilled labor, who will deem the rates of compensation under the law as entirely inadequate, or will be careful workmen in the less dangerous trades, who will see no gain in bartering their common-law rights for the restricted remedies furnished by the statute. It cannot be said with any certainty that such men will be discharged for their failure to voluntarily come under the law. The proba-

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bility would seem rather to be that they would be of a class which the employer would wish to keep in his employ, notwithstanding their attitude toward the law. These matters are, however, purely speculative and conjectural. None can say what the practical operation of the law will be. It is enough for our present purpose that no one can say with certainty that it will operate to coerce either employer or employé.

We thus reach the conclusion that there are no valid constitutional objections to the first section of the law in question, and this conclusion obviates the necessity of any consideration of the provisions of § 2394-32, which aims to preserve the balance of the law intact in case the whole or some part of § 1 should be considered invalid. We may say in passing that we know of no good reason why the legislature may not declare its intention that one part or section of a law is not a compensation for and that it may be separated from the balance of the act for the very purpose of saving such balance from being invalidated in case the first-named part or section be held unconstitutional. We think it would take a very extreme case of palpable absurdity or falsity in such a provision to justify any court in declaring such a declaration of legislative intent ineffective, if indeed a court could make such a declaration at all.

The next important contention is that the law is unconstitutional because it vests judicial power in a body which is not a court and is not composed of men elected by the people in violation of those clauses of the state constitution which vest the judicial power in certain courts and provide for the election of judges by the people, as well as in violation of the constitutional

guaranties of due process of law. It was suggested at the argument that the Industrial Commission might perhaps be held to be a court of conciliation, as authorized to be created by § 16 of article 7 of the state constitution; but we do not find it necessary to consider or decide this contention. We do not consider the Industrial Commission a court, nor do we construe the act as vesting in the commission judicial powers within the meaning of the constitution. It is an administrative body or arm of the government, which in the course of its administration of a law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi judicially; but it is not thereby vested with judicial power in the constitutional sense.

There are many such administrative bodies or commissions, and with the increasing complexity of modern government they seem likely to increase rather than diminish. Examples may be easily thought of. Town boards, boards of health, boards of review, boards of equalization, railroad rate commissions, and public utility commissions all come within this class. They perform very important duties in our scheme of government, but they are not legislatures or courts. The legislative branch of the government by statute determines the rights, duties and liabilities of persons and corporations under certain conditions of fact, and varying as the facts and conditions change. Manifestly the legislature cannot remain in session and pass a new act upon every change of conditions; but it may and does commit to an administrative board the duty of ascertaining when the facts exist which call into activity certain provisions of the law, and when condi-

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tions have changed so as to call into activity other provisions. The law is made by the legislature; the facts upon which its operation is dependent are ascertained by the administrative board. While acting within the scope of its duty, or its jurisdiction, as it is sometimes called, such a board may lawfully be endowed with very broad powers, and its conclusions may be given great dignity and force, so that courts may not reverse them unless the proof be clear and satisfactory that they are wrong. *M., St. P. & S. S. M. R. Co. v. R. R. Com.*, 136 Wis. 146; 116 N. W. 905; 17 L. R. A. (N. S.) 821. Not only this, but many such boards are created whose decisions of fact honestly made within their jurisdiction are not subject to review in any proceeding. *State ex rel. v. Chittenden*, 112 Wis. 569; 88 N. W. 587; *State ex rel. v. Wharton*, 117 Wis. 558; 94 N. W. 359; *State ex rel. Cook v. Houser*, 122 Wis. 534-561; 100 N. W. 964; *State ex rel. v. Trustees*, 138 Wis. 133; 119 N. W. 806; 20 L. R. A. (N. S.) 1175. It is important to notice the limitation contained in the last sentence. The decision of such a board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review. It cannot itself conclusively settle that question, and thus endow itself with power. If no appeal from its conclusions be provided, the question whether it has acted within or exceeded its jurisdiction is always open to the examination and decision of the proper court by writ of certiorari. The instances where the question of jurisdiction of such bodies has been examined and decided in certiorari actions are so numerous that it seems unnecessary to cite them. In such cases it is considered

that clear violations of law in reaching the result reached by the board, such as acting without evidence when evidence is required, or making a decision contrary to all the evidence, constitute jurisdictional error, and will justify reversal of the board's action, as well as the failure to take the proper steps to acquire jurisdiction at the beginning of the proceeding. *State ex rel. Augusta v. Losby*, 115 Wis. 57; 90 N. W. 188.

Thus, in the case before us, the jurisdiction of the Industrial Commission to entertain any claim for compensation under the act rests upon two facts which must exist, viz.: (1) That both employer and employé have elected to come under the act; and (2) that the injury was received in service growing out of or incidental to the employment as the result of accident, and not of willful misconduct.

The Industrial Commission must, of course, decide these questions in any case where they are raised; but it cannot decide them conclusively, for they are jurisdictional questions on which its right to act at all depends. They must be open to review in some court of competent jurisdiction; otherwise, the parties would be denied due process of law. The tribunal only has authority over those who have voluntarily elected to give it authority, and if it can decide finally that a man has given consent, when he has not, it assumes the functions of a court. If the act before us took away from the courts the power to consider these jurisdictional questions, either expressly or by necessary implication, the contention that judicial power had been vested in the commission, contrary to the command of the constitution, would be of greater force; but we think that the act does not do this, or attempt to do it. True,

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it says that the findings of fact made by the commission shall, in the absence of fraud, be conclusive; but it provides for an action in the Circuit Court of Dane County, in which the board's award may be set aside upon either of three grounds, viz.: (1) That the board acted without or in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact do not support the award.

We regard the expression "without or in excess of its powers" as substantially the equivalent, or at least as inclusive of the expression "without or in excess of its jurisdiction," as those words are used in certiorari actions to review the decisions of administrative officers and bodies. We know of no other construction that can be logically given to them, and it seems to us that they were designedly and advisedly inserted by the framers of the bill to meet the very objection which is now made. With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man without his consent can be brought under the law or is deprived of his right to "due process of law" thereby.

There are some further objections which will be more briefly considered. It is said that, even if it be held that the act is not coercive, still when employer and employé consent to come under the law they in effect wholly stipulate away their rights to resort to the courts, and that such agreements are void, citing *Fox v. M. F. A. Assn.*, 96 Wis. 390; 71 N. W. 363. The case cited, however, recognizes the companion principle that agreements to arbitrate special matters, such, for instance, as the amount of the loss under an insurance policy (or, as in the present case, the extent of an injury or

disability, and the like), which do not go to the whole groundwork of the controversy, are universally sustained. As we have seen, these special matters are the only matters which the board may conclusively decide under this law. If there be a controversy as to fundamental rights, namely, whether the parties have consented, or as to whether the injuries resulted from willful misconduct, these issues are still open to the court upon the appeal.

In considering the question as to how far consent may go in matters of this kind, a case not cited in the briefs or mentioned in the oral argument should, we think, be referred to here, viz., the case of *Van Slyke v. Insurance Co.*, 39 Wis. 390; 20 Am. Rep. 50. In this case it appeared that the legislature had passed a law providing that in case of the filing of an affidavit of prejudice against a circuit judge the parties might, if they chose, stipulate that a member of the bar should act as judge and try the case, with all the powers of the regularly elected judge of the court. Acting on this law, the parties in the case agreed that Mr. John J. Cole should try the case, and he did so, rendered judgment for the plaintiff, and the defendant appealed. The court held (Chief Justice RYAN writing the opinion) that the constitution having vested all the judicial power of the State in the courts, and provided for the election of judges for such courts, the legislature could confer no judicial power on other officers or persons, nor authorize the parties to an action to do so; hence there was no trial before a court, and no judgment. The question as to whether the defeated party might not be prevented from raising any objection by his voluntary waiver was not considered or mentioned;

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but in any event the case has no bearing here, and is only mentioned in order to show that it has not been overlooked. It only decides that neither the legislature nor private parties can make a judge out of a private citizen, and endow him with the power to hold a court, contrary to the direct command of the Constitution. As the commission in the present case is not a court, but simply an administrative board, the doctrine laid down in the cases cited has no application.

Again, it is said that the act compels municipalities to levy taxes for other than public purposes, since all workmen injured in the employ of the public are to be compensated, and thus taxpayers will be deprived of their property without due process of law. We have not been quite able to appreciate the force of this point, and we find no argument upon it in the brief. We shall only say that the manner in which the State or the public shall treat its workmen is peculiarly a matter for the legislature to determine. No one is compelled to work for the public, and, if he does, he takes his situation on the terms which the public gives. We know of no reason why the public, acting by its law-making power, may not provide that its employes shall have as part of their compensation certain indemnities in case of accidental injury in the public service. When a law does so provide, the raising of the funds to discharge those indemnities, becomes plainly a proper public purpose.

Objection is made to those clauses of § 2394-16 which provide for the giving of notice of claim by mail, and allow testimony to be taken without notice to either party, and the claim is made that this is not "due process of law." Were the commission a court,

these objections would probably deserve serious consideration, especially the latter one. But, as we have seen, the commission is an administrative board merely. It is common knowledge that such boards are frequently given power to investigate and determine facts without notice to the parties of each successive step in the proceedings. The proceedings before such boards are not expected to be as formal and cumbrous as the proceedings of courts; indeed, the greater flexibility which such bodies must possess if they are to discharge their duties seems to demand greater freedom of action. If notice, either actual or constructive, of the commencement of the proceedings before such a body be required to be given to the parties interested, and they be given full and free opportunity to be heard and present evidence, it is generally held sufficient, even though notice of intermediate steps in the proceeding be not required or given. *Schintgen v. La Crosse*, 117 Wis. 158; 94 N. W. 84. In case of a board like the present, which only acts on the rights of parties who have consented that it may so act, the reason of the rule is far stronger.

Some contention is made in the brief that minors cannot be treated in the same manner as adults, and that the provision of the law which declares that a minor who is legally entitled to work shall have the same power of contracting for service as an adult is objectionable, because it allows the employer to decide whether the law shall treat his minor employés as adults. The objection seems to us fanciful and elusive. There is no claim that the legislature may not endow minors with the right to make contracts otherwise lawful, and, if this be so, it seems to us to be the end of the discussion. After the minor is so endowed, he becomes for the pur-

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poses of the act an adult, or at least on the same plane. No adult employé of a private employer can elect to come under the act unless his employer has first elected to do so. So the employer has the power to decide whether any of his employés, infant or adult, shall have the privileges of the act if they continue to work for him. This is practically all there is of the matter, and we see no substantial distinction between the effect of the law upon the adult and its effect upon the minor.

The foregoing considerations are believed to fully meet and dispose of all the objections made to the law which could reasonably be claimed to be fatal to the entire law if sustained. There are many objections made to single sections or clauses of the law, which we do not find it necessary or advisable to treat at this time. Even should some or all of them be sustained, it is our judgment that the sections or clauses so questioned could not be said to be so far compensations for or inducements to the balance of the law that the entire law must fall. In our judgment it is better to reserve these questions for consideration when an actual case arises which calls for the decision of the court upon them. It is well-nigh impossible for the human mind to call up and contemplate in advance all the considerations which ought to be considered in passing upon the validity of the various incidental clauses of a new and complicated law. The concrete case and its actual circumstances and effects are apt to throw much light upon the question and suggest considerations wholly unthought of when viewing the matter abstractly in advance of any actual experience.

Among these contentions, which we now pass without

decision, perhaps the most important is the contention that so much of § 2394-16 as provides that the board or any member thereof, or *any examiner appointed thereby*, shall have power to issue subpoenas, obedience to which shall be enforced by contempt proceedings in the Circuit Court. This seems to present a serious question, worthy of careful examination, and we intimate no opinion upon it now.

Other minor contentions, which we do not consider it necessary or advisable to pass upon now, are to the effect that the clauses are void which empower the commission (1) to declare and enforce penalties against the employer for failure to perform certain orders of the board made pending hearing (§ 2394-17); (2) to set aside or modify contracts of settlement previously made by the parties (§ 2394-15); and (3) to regulate the amount of contingent attorney's fees and permit one claimant to make a contract which it may refuse to allow another to make (§ 2394-22).

Before closing, we shall briefly refer to another question which was not much discussed on the argument, namely, the question whether the law applies or was intended to apply to persons who, like the plaintiffs, are employed under contracts of service made prior to the passage of the law, and which do not expire until some definite date in the future, and, if so, whether the law can apply to them without impairing the obligations of their contracts, and thus violating the constitution. As to the first branch of this question, we think that the language of the act leaves no doubt as to the intention of the legislature. The entire act by express terms was to become effective September 1, 1911. Its provisions are broad, and without express exception,

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read according to their grammatical meaning, they include all employers and employés, who occupy those relations at the time the law becomes effective. If there was an intention to exclude any from its terms, that intention has been carefully concealed. We conclude that it was intended to include all employers and employés, whatever the term of service. The question whether the act as so construed affects an existing contract of service expiring at some distant period in the future is easily answered in the negative, as it seems to us. Certainly the law does not affect the service to be rendered, or the wages to be paid in any way. Neither the obligation of the workman to faithfully do his work, nor the obligation of the employer to faithfully pay the stipulated wage, nor the remedy in case of breach by either party, is in any way affected. What, then, is affected? Plainly no provision of the contract; but, if the employer elects to come under the law, the employé must choose whether he will come under it or not, and if he does not wish to come under it he may run the risk of being discharged, or if he wishes to retain his employment he may feel compelled to elect to come under the law, and thus lose his right to bring an action at law in case of a personal injury sustained in the employment.

But all this does not in any way affect the contract of employment. That remains absolutely unimpaired in all its terms. The right to bring an action in the future in case of a possible tort not yet committed is no part of the contract of employment. That right arises out of the relation of employer and employé, and is subject to change by the lawmaking power at any time. The employer does not contract that it

shall remain intact. There is no vested right in a mere remedy for a hypothetical wrong. At most the law cannot be said to do more than change the remedy for a tort which is yet to happen, and may never happen. The legislature may change the remedies for torts yet to be committed at any time, and such changes cannot be said to make any change in mere contracts of service existing between the parties. This seems very patent. The legislature has at many times within the last two decades passed laws very materially changing the liabilities of employers to employes for injuries resulting from the negligent acts of the employer, *e. g.*, the laws requiring the protection of machinery, abolishing assumption of risk in such cases, abolishing the coemployé rule as to railway companies, and changing the rules as to contributory negligence. In no case has the claim ever been made that these laws in any way affected or impaired existing contracts of service for terms expiring in the future although many cases must doubtless have occurred where those laws were applied to parties who were under such contracts.

We have now discussed all of the contentions made against the law which we deem entitled to detailed treatment, and we find no serious difficulty in sustaining its fundamental and essential provisions. As said in the beginning of this opinion, this law forms the answer of the legislature to a very widespread demand. It is a legislative attempt to reach within constitutional lines some fair solution of a serious problem which other nations, not restricted by written constitutional inhibitions, have solved or partially solved years ago. Doubtless the law will need and will receive changes and amendments as time shall test its provisions and

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demonstrate its weak points. It would be unreasonable to expect that a law covering so important a subject along lines not before attempted should be perfect, or very near perfect, upon its first enactment. If experience shall demonstrate that it is practicable and workable, and operates either wholly or in great measure to put an end to that great mass of personal injury litigation between employer and employé, with its tremendous waste of money and its unsatisfactory results, which now burdens the courts, the long and painstaking labors of those legislators and citizens who collaborated in framing it will be fittingly rewarded by a result so greatly to be desired. That result will mean a distinct improvement in our social and economic conditions.

The effect of our conclusions upon the result in the present case is yet to be considered. The complaint was sustained, and the injunction granted, on the ground apparently that, the law being valid, the plaintiffs would be greatly injured if their employer elected to become bound by it, because they would be obliged either to break their existing contracts or lose their common-law remedies for their employer's torts. Granting all that plaintiffs claim as to the necessary results of their employer's election, it is very certain that no irreparable injury results to them. If their employer breaks his contract of employment because they decline to accept the new law, they have adequate legal remedies for the recovery of damages. If, on the other hand, they elect to come under the law themselves, they lose no vested or contract right, and are not damaged in the eyes of the law by the change in their remedies for future torts. In either event there is no cause of action

in equity, and no ground for an injunction. The complaint should have been dismissed on the pleadings.

Judgment reversed, and action remanded, with directions to dismiss the complaint.

BARNES, J. (concurring):

I concur in the opinion of the Chief Justice, except in so far as it is said in effect that our constitutions may mean one thing to-day and something different to-morrow, depending on whether conditions and ideals have in the meantime undergone a change. I regard our constitutions as immutable, except when changed in the manner therein prescribed. Judges, interpreting our fundamental laws, may at one time reach conclusions different from those which would be reached at another time. This does not argue that the constitutional provision under consideration has undergone any change, but demonstrates that judges, being finite beings, made a mistake at one time or the other. No act of the legislature should be declared unconstitutional unless it is clearly so. This is elementary. By hewing closely to this line, there is little danger of the courts committing any serious blunders in interpreting our organic laws. If a legislative act, measured by this standard, trenches on the Constitution, it should be held void, regardless of whether or not the provision violated is out of harmony with twentieth-century conditions and ideals. To hold otherwise is to say that the courts may change our fundamental laws. This would be a clear usurpation of power, never vested nor intended to be vested in the courts, and one which was reserved to the people themselves. I am a firm believer in constitutional government. I do not share

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the belief that our constitutions have become archaic, or that they have outlived their usefulness. If the opinion of the court is intended to mean that it is a doubtful question whether our constitutions should be preserved or thrown in the "scrap heap," I do not agree with it.

MARSHALL, J. (concurring):

The result, itself, meets with my unqualified approval. Some language in the court's opinion, however, respecting the Constitution, I fear will be construed in a different way than the writer thereof, or any member of the court, intended or would sanction, tending to impair the lofty character of the fundamental law as significantly maintained by this court. I am not alone in that. Other language appears which does not express my personal views. True, none of such is matter of decision or even judicial dicta, but, if left unchallenged, it is liable to misleadingly indicate a trend of judicial thought here which, I am safe in saying, does not exist. I choose to avoid responsibility therefor. It, seemingly, is my duty to do so. In discharging that duty I wish not to take from the dignity of the court's able opinion on the vital questions presented for solution. I do not understand they involved any new constitutional, or any, question of difficulty, giving rise, under any circumstances, to desire a broader fundamental spirit than has been long firmly entrenched in the jurisprudence of this country.

The law approved is a very mild piece of legislation. While I would not suggest it is too moderate for now—for that is not within my province—yet I would not indicate that the legislature responded as fully as it might to the need for a system as directly as practicable,

laying the personal injury burdens of production upon the things produced where they belong, as should have been efficiently recognized long ago, and would have been had the lawmaking power appreciated that it is its province, not that of courts, to cure infirmity in the law. If criticisms, unjustly and freely directed toward the latter and the human instrumentalities thereof, merely because of their fidelity to duty to maintain the laws as given, had been turned upon the former for failure to better conserve human happiness in the industrial field in the light of twentieth-century conditions, untold suffering might have been prevented, which only the people's representatives could prevent. Tardy recognition of such duty casts no reflection upon legislative actors of to-day. Who can say but that they would have had the same ideals as now, and effected the same results long ago if opportunity had been offered them to do so? It has been, in the past, far easier to criticise a power which was helpless to supply a remedy, than to suggest one or move legislative power to adopt one.

I am constrained to write the foregoing to give deserved credit to the patient, earnest, efficient labor of the lawmakers who placed the enactment in question upon the statute book of this State. It would give them too little credit to record, merely, that they bowed to public demand, and too little credit to this court to leave room for the thought that it has been influenced by any such demand to give the Constitution any new shade of meaning to sustain the enactment, or that it would change, or arrogate to itself power or disposition to change, fundamentals in any sense, by judicial interpretation.

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As to the subject of the enactment, advanced thinkers in economics, law and legislation have been at the front and the public has been slow to follow. It took the industrious, able, patient, tactful legislative committee over two years of activity, to educate the people up to willingness to accept on trial the mild law before us. Opposition had to be overcome by education on all sides. The legislature responded, not so much to a general demand, as to a constitutional command, to conserve, in the light of the present, the public welfare.

The remarks in the court's opinion which may suggest to some that a different meaning is to be read out of the Constitution now than formerly; that it may have meant one thing when framed and later another, and now be held differently, according to judicial interpretation to meet social necessities as recognized by human instrumentalities in the particular environment—probably was not so intended, but I sense danger of a contrary impression going out. Such ability to bend the fundamental law in the name of judicial interpretation—the idea that an eighteenth-century construction for an eighteenth-century condition may not, and at the hands of the court does not have to, fit a twentieth-century condition—has been advanced by some, but not, significantly at least, by any court. On the contrary, it has met with universal condemnation. That it is wrong, every man of eminence that has ever written upon the subject in the past, as well as the very nature of the case and the very logic and limitations of judicial interpretation, bear witness. The fertile method of dealing with the Constitution has been characterized as one which has “furnished a mode of argument which would on the one hand leave the Constitution crippled

and inanimate, or on the other give it an extent of elasticity subversive of all rational boundaries." Story, Constitution, 389.

Manifestly, there can be but one right interpretation or construction of the Constitution. It is said to have been constructed of general declarations, so that, in letter and spirit, it might abide indefinitely and would have to so abide, dealing with all conditions and all ages, except as amended in the manner therein specified. Considerately with that, there can be but one viewpoint for interpretation, and that is the one from which the framers of the system builded. That is unmistakably indicated in *Marbury v. Madison*, 1 Cranch, 137; 2 L. Ed. 60; *Martin v. Hunter*, 1 Wheat. 304; 4 L. Ed. 97.

We speak of the Constitution in a general sense—the American system, commencing with the Federal model and including the state constitutions framed in harmony therewith. In all writings thereon, from Chief Justice MARSHALL to date, the idea that it cannot be properly judicially changed to suit the notions of the times, and that there will appear little need therefor when the real nature thereof is comprehended, is made prominent. It was that idea, largely, which moved one eminent writer to speak of it as the "greatest single achievement of the eighteenth century," and another to characterize it as the "most wonderful work ever struck off at a given time by the brain and purpose of man." Truly, it cannot be said of that which was so unequaled in the eighteenth century, and, we may well add, was unequaled in the nineteenth and has been since, that it can take the cast, so to speak, from time to time of its environment as judicial instrumen-

talities may view it through the vista of conditions *in præsenti*. All history says no. The very inconsistency of the contrary says no. The absence of any necessity for, and the destructive danger of, any such quality, say no.

A new remedy for a new condition within the boundaries of reason is within legitimate police authority. Who could wish more? How could more exist and human liberty—natural, inherent rights—be safe? Would it not be well to recur to the classic rule for testing legitimacy of legislative enactments, given by the most eminent judicial expounder of the Constitution of which the history of American jurisprudence bears record:

“Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.” *McCulloch v. Maryland*, 4 Wheat. 316, 421; 4 L. Ed. 579.

With that and the significance of the declared purpose and central thought of the Constitution in mind, much of the supposed difficulty which has stimulated suggestions of competency to, and necessity for, bending it by a usurpatious method of interpretation, will disappear.

How are we to determine when the purpose of a law, in the field of police power, and unaffected by any express prohibition, is legitimate? It seems the answer is easy. Look first to the purpose of the Constitution, found in the declaration, “Grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect union, insure domestic tranquillity and

promote the general welfare" we "do establish this Constitution." Then to the central thought—the very superstructure—upon which the whole was builded: "All men are born equally free and independent and have certain inherent rights, among those are life, liberty and the pursuit of happiness." There is voiced a broad spirit, covering as this court has, in effect, many times said, a field as limitless as are human needs. The language was not used for mere rhetorical ornamentation or effect, but to suggest the permissible scope of legislation in the zone of general welfare, its extent and its limitations. *Durkee v. Janesville*, 28 Wis. 464; 9 Am. Rep. 500; *State, etc., v. Kreutzberg*, 114 Wis. 530; 90 N. W. 1098; 58 L. R. A. 748; 91 Am. St. Rep. 934; *State, etc., v. Redmon*, 134 Wis. 89; 114 N. W. 137; 14 L. R. A. (N. S.) 229; 126 Am. St. Rep. 1003; *Bonnett v. Vallier*, 136 Wis. 193; 116 N. W. 885; 17 L. R. A. (N. S.) 486; 128 Am. St. Rep. 1061.

So here, as it seems, the initial question was this: Is the purpose of the law legitimate, within the broad dominating spirit mentioned? The answer must be yes, as the manifest purpose is to promote every element of the central thought of the Constitution. Anything fairly within that has always been and must, necessarily always, be held legitimate. Keeping in mind that in the selection of means the legislature has a very broad comprehensive field in which to freely make a choice, the next question is, are the means contemplated reasonably appropriate to the end to be attained? Not are they the best means, but are they proper means, in that they are not within any express prohibition and tend to conserve rather than to destroy? All must agree in the affirmative on that in harmony with the

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best thought of all the more civilized nations of Europe. The difficulty here has been, want of appreciation of the great economic truth, that personal injury losses incident to industrial pursuits, as certainly as wages, are a part of the cost of production of those things essential to or proper for human consumption, and the more direct they are incorporated therein, the less the enhancement of cost and the better for all.

True, the old remedies for losses mentioned have been inefficient and wasteful. They are, economically speaking, unscientific and have always been. It is more apparent now than formerly by reason of greater and more numerous modern activities and methods, that is all. In truth, the infirmity from an economic standpoint, and from the standpoint of man's duty to his fellow men, has always existed, though the quantum of regrettable results and useless waste has greatly increased by the multiplication of human activities and physical instrumentalities.

So it will be seen, I think, that while particular means may be reasonably appropriate to a legitimate purpose under some conditions characterizing a particular period, and not have been at a prior time, no change in the Constitution is involved in remedying the misfit. The end being proper the legitimacy of means may be dependable upon conditions, the question turning more on matter of fact than anything else. The change of mere means does not require a fundamental change, so long as legitimacy of end and reasonable appropriateness of means shall be kept efficiently in view.

Want of appreciation, in my judgment, of the Constitution from the viewpoint suggested, has led some to

advocate judicial changes to meet new conditions, while others have insisted that many amendments, made in the prescribed way, practically substituting a new system for that of the fathers, are necessary or advisable, and still others have maintained the broad liberal view suggested, which was early entrenched in the jurisprudence of this country by the judicial writings of Chief Justice JOHN MARSHALL. That idea renders changes of any kind unnecessary to legislative competency to legislate to any extent which reasonably promotes a constitutional object. Anything further would destroy, or tend to destroy, instead of promote public welfare. Such idea is the safe one and the right one from the viewpoint, I think, of the fathers. It is the one sturdily maintained by this court. It is the one I feel competent to say, all members of this court would now maintain and that nothing in its opinion should be otherwise taken.

If the Constitution is to efficiently endure, the idea that it is capable of being resquared, from time to time, to fit new legislative or judicial notions of necessities *in præsenti*, instead of new legislation being tested by it, must be combated whenever and wherever advanced, and wrong impressions in regard to the matter carefully guarded against. To even, significantly, speak of making the Constitution adaptable to new conditions by means of interpretation, when the selection of new and constitutional means, adaptable to such conditions, is meant, is liable to confuse and weaken that high regard all should have for the fundamental law as a broad, definite, certain, comprehensive, unvarying and unvariable system, other than by the means therein pointed out. Dark will be the day, if that day will

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ever come, for the people of this country, and dark to the people of all countries whose attention is directed here for lessons in constitutional government, when our system shall not be held up by the courts as speaking the same at one time as at another, except in so far as changes shall be made in the particular way. That is the doctrine of *Marbury v. Madison*, 1 Cranch, 137; 2 L. Ed. 60. No one can read that great exposition of our system without appreciating how illogical it is to speak of interpretation as an instrumentality for giving, from time to time, a different cast to the fundamental law. The whole spirit of the court's logic condemns such reasoning as heresy. Note the significance of this: "The exercise of this original right" to make a system of government "is a very great exertion, nor can it, nor ought it to be frequently repeated. The principles therefore, so established, are deemed fundamental, and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent." In that connection the court added, in unanswerable logic, that the Constitution is not only the paramount law, but is absolutely unchangeable by ordinary means; that laws adaptable to it are legitimate, and laws so called, not so adaptable, are not laws at all. It was designed to govern the legislature and the courts as well. That conception is of something high above either legislatures or courts, to vary it. How can that be done by indirection, miscalled interpretation and construction—a method of rounding a syllogism with a conclusion based on false premises. Interpretation of that sort would enable courts to evade and render useless the most carefully drawn enactments whether of fundamental or subsidiary law.

So, in short, I think the law in question is a reasonably appropriate means to effect a constitutional purpose; that the constitution needs no bending whatever in order to sustain it in its essential features, and none would be proper if the contrary were the case.

The foregoing I can but regard out of harmony with this, in its letter: "Changed social, economic and governmental conditions and ideals of the time, as well as the problems the changes have produced, must largely enter into the consideration and become influential factors in the settlement of problems of construction and interpretation"—so far as it is pregnant with the thought that the fundamental law is judicially changeable. The words "problems" of "construction" and "interpretation" I think were unfortunately used, if the thought was merely of problems of whether new enactments to cope with new conditions are within or without the legitimate field of legislative activity, having regard to appropriateness of means to effect a constitutional end. The latter might be, as I have suggested, at one time and not a half century theretofore, because changed conditions may render an end legitimate, within the unchangeable scope of the fundamental law, which earlier was not, or the selected means to effect that end might be reasonably appropriate at one time, though not so a century, more or less, theretofore.

Why treat judicial interpretation of law as a process of following changing ideals, social problems and ideas, since its sole office is to solve uncertainties as to the intent at the time of the enactment? Interpretation commences where begins uncertainty—obscurity as to the meaning the lawgivers purposed putting into the

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enactment and succeeded, discoverably, in expressing, literally or inferentially. In short, the gist of the matter is the intent when the law was made, not what one can make the language say in a different environment from that of its origin to accomplish a desired purpose. No bending is permissible for the latter purpose, but for the former the very letter may have to give way to the spirit. *State, etc., v. Ryan*, 99 Wis. 123; 74 N. W. 544; *State, etc., v. R. R. Comm.*, 137 Wis. 80; 117 N. W. 846; *State, etc., v. Phelps*, 144 Wis. 1; 128 N. W. 1041. The expounder is to "look to the whole and every part of the law, to the intent apparent from the whole, to the subject-matter, to the effects and consequences, to the reason and spirit, and thereby ascertain the ruling idea present" in the lawgiving body's mind at the time of the enactment, and then, so far as such idea can reasonably be spelled out of the enactment, give effect to it though it violates the letter. *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 659; 79 N. W. 422.

True, "the Constitution is a very human document" in the sense that it is a collection of words recognizing, characterizing and guaranteeing the natural rights of man—all that are essential to public welfare in the social state, but not so in the sense of creating such rights. The right to life, to liberty, to happiness, to equality one with another, are not of human creation. They are of divine origin, though by human instrumentality some one or more of them might be taken away. It is to prevent that, in the main, the Constitution was framed. So anything not expressly prohibited which reasonably conserves those God-given rights, is within its saving grace. Anything which clearly or materially

impairs or destroys any one of them is condemned by it. It were better to inculcate the idea that it is not subject to change with the change of times and conditions, though such new conditions, by logical process may well be the deciding factor as to whether legislative means, resorted to for a particular end, are within or without the unchangeable constitutional principles. Manifestly it must have been the latter conception of the Constitution which so inspired statesmen of the first century of the republic with veneration for it. That might well have inspired Webster to love it, 'to have a profound passion for it,' to 'cherish it day and night,' to 'live on its healthful saving influence,' and to 'trust never, never to cease to heed it until' he should 'go to the grave of his fathers,' to 'earnestly desire not to outlive it.'" It is good to draw inspiration from those lofty sentiments. I would not by word or deed, to any extent give rise to the thought that the ancient dignity of our system, in judicial conception here, has changed.

At no period has appreciation of the great work of the fathers been more important than now. We need to sit anew, in thought, at their feet—revive knowledge that the result was wrought by a body of men—representatives of the great seats of learning of the English-speaking race of two hemispheres, and otherwise men of broad experience, many of whom had been students of all Federal governments of all prior ages in preparation for the special task—as the historian declared, "the goodliest fellowship of lawgivers whereof this world has record"—a body dominated by specialists inspired "by ennobling love for their fellow men" and the thought that they wrought, not for their age alone, but for the

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ages to come, and, so, sought to avoid the infirmities of previous systems of government by the people, by carefully providing that no change in letter or spirit should occur except in a particular and most deliberate and conservative way.

Appreciating that the report of this case will be widely read and commented upon within and without the field of judicial administration, I particularly desire to avoid creation of, or administering to, false impressions respecting the dignity of the abolished defenses and the responsibility of courts for their existence.

True, such defenses are of judicial origin, but not as that term, without explanation, might be understood by laymen. They are so in the same sense that a large part of the law, upon which rights and remedies depend, is of such creation. Nevertheless, all such is as much the law of this State, to be respected by the courts, as any part of the Constitution or any act of the legislature. It did not originate with the courts of our age or century. It has not been within the competency of this court at any time to change it. The defenses in question became a part of the law of the mother country through its judicial administration long before the Revolution. The law of such country, so far as adaptable to our conditions here, was adopted when our independent government was formed, and became the common law of this country. It was in full force in the territory of Wisconsin when our State was admitted into the Union. All officers were sworn to maintain it—that part relating to the law of negligence as well as the rest—and were bound to do so with as much fidelity as if incorporated into the written law. When the Constitution was adopted the unwritten law was substantially given

the cast of written law and as such firmly entrenched as fundamental, subject to legislative change, by § 13, article 14, of the Constitution in these words: "Such parts of the common law as are now in force in the Territory of Wisconsin, not inconsistent with this Constitution, shall be and continue part of the law of this State until altered or suspended by the legislature."

Every judge of every court has been sworn to maintain the common law as thus intrenched in our system till changed by the legislature. So from the viewpoint of the present, the law of negligence—including the defenses in question—does not lose in dignity when compared with an act of the legislature, because ages ago it had judicial origin. It was, as we have seen, with deliberation adopted by the people when they organized our state government. No court in our time has had competency, we repeat, to change or create or destroy in that field. Power in that regard was expressly reserved to the legislature. It has been free to act in the matter, within such reasonable limits as not to violate guaranteed rights, for over sixty years, while the courts have been powerless to do more than to determine, to the best of their ability, the law as fundamentally adopted, or subsequently changed, by the lawmaking power, and apply it.

Under the power reserved to the legislature as aforesaid, it was competent for it to abolish the defenses in question, and to do it in such a way as to create inducement for employers to, voluntarily, become parties to the new system designed to better conserve human life and human happiness. Call the method "constitutional coercion," if thought best. That casts no discredit upon the method, for where coercion is necessary

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coercion is legitimate, no guaranteed rights being infringed upon.

It is needless to add that I heartily endorse all said in the court's opinion regarding the importance of the legislation which has received approval. May it be the beginning of a well rounded out constitutional system making every one who consumes any product of labor for hire pay his proportionate amount of the cost of the creation representing the personal injury misfortunes of those whose hands have enabled him to secure the objects of human desire, thus minimizing the sufferings which are the natural incidents of industry and should be borne, so far as they represent pecuniary sacrifice, by the mass of mankind whose desires are administered to by such industry.

STATE EX REL. DAVIS SMITH CO. *v.* C. W. CLAUSEN AS
STATE AUDITOR

(00 Wash. 000; 117 Pac. Rep. 1101)

Constitutional law; Workmen's Compensation Act; liability without fault; police power; invalidity of portion of act as affecting entire statute; classifying industries; class legislation; uniform taxation; trial by jury.

1. The test of the validity of a law which creates a liability without fault is not found in the inquiry: Does it do an objectionable thing? But is found rather in the inquiry: Is there no reasonable ground to believe that public safety, health or general welfare is promoted thereby?
2. The legislature cannot declare a particular industry commonly engaged in by the people, to be unlawful, which

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under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been at its inception, whenever it becomes a menace to the employes engaged in it, the people surrounding it, or to any considerable number of people at large, no matter from whatsoever cause the menace may arise. This it does under the police power.

3. As the act in question has a reasonable relation to the protection of the public health, morals, safety and welfare, it will not be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another.
4. That portion of the act which permits certain sections to stand even though others are declared to be invalid does not render the act unconstitutional.
5. Classifying industries for the purpose of collecting premiums and distributing compensation does not render the act invalid as class legislation.
6. The act is not invalid as creating taxation which is not uniform.
7. The statute is not unconstitutional as infringing the right of trial by jury.

En Banc. Original proceeding by the State, on the relation of the Davis-Smith Company against C. W. Clausen, as state auditor, to compel the issuance of a warrant on the state treasurer in payment of an obligation incurred by the Industrial Insurance Department. Writ issued.

W. V. Tanner (*Harold Preston and Geo. A. Lee*, of counsel), for plaintiff.

Denman & Fishburne (*Graves, Krizer & Graves*, of counsel), for defendant.

FULLERTON, J.:

This is an original proceeding in mandamus, brought by the relator to compel the state auditor to issue a warrant on the state treasurer in payment of an obligation incurred by the industrial insurance department. The application was in the form required by the statute governing the practice in such cases, and sets forth facts which, on their face, show that the applicant is entitled to the warrant demanded. The auditor demurred generally to the application, and at the hearing his counsel argued that the act purporting to authorize the expenditure for which the warrant was demanded was unconstitutional and void.

It was suggested at the argument that the question of the constitutionality of the act could not be raised by the auditor in this form of proceeding, but to do so is in accord with the practice in this State. In *State ex rel. Olmstead v. Mudgett*, 21 Wash. 99; 57 Pac. 351, the relator sought by mandamus to compel the county treasurer of Spokane to collect an assessment levied to pay the cost of a street improvement, and, on the demurrer of the treasurer to the application for the writ, we inquired into the constitutionality of the act authorizing the assessment to be made. To the same effect are *State ex rel. Port Townsend v. Clausen*, 40 Wash. 95; 82 Pac. 187, and *Hindman v. Boyd*, 42 Wash. 17; 84 Pac. 609. In the latter case it was acknowledged that the authorities on the question were in conflict; but it was said that the preferable rule was with the cases holding that the question could be thus raised. On principle the ruling seems to be sound. If it be true that an act of the legislature authorizing the disbursement of public money is unconstitutional, to inquire

into it on the objection of an officer having in charge such disbursement may save an expenditure that would be otherwise lost to the State were the court to await the suggestion of the question by some private litigant injuriously affected by the Act. There is no merit in the objection that the officer is without interest in the proceeding. He is charged with the duty of conserving the public funds, and consequently must be held to have an interest in any proceeding which directly tends to that end.

The act thought to be unconstitutional by the auditor is the act of the legislature of March 14, 1911, commonly known as the "Workmen's Compensation Act." Laws of 1911, p. 345. The act is of too great length to be set forth here in full; but the following epitome of its several provisions will give an understanding of its salient features, and of the questions involved on this hearing:

Section 1 contains a declaration of the policy of the act. It recites that the common-law system governing remedies of workmen against employers for injuries received in hazardous employments are inconsistent with modern industrial conditions; that in practice such remedies have proven economically unwise and unfair; that their administration has produced the result that little of the cost thereof to the employer has reached the workmen, and that little, only at a great expense to the public; that the remedy to the individual workman is uncertain, slow and inadequate; that injuries in such employments formerly occasional have become frequent and inevitable; that the welfare of the State depends upon its industries, and even more upon the welfare of its wage workers. And it thereupon declares that the State of Washington, exer-

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cising its sovereign powers, withdraws all phases of the premises from private controversies and provides sure and certain relief for workmen injured in extra-hazardous work, and their families and dependents, regardless of questions of fault, to the exclusion of "every other remedy, proceeding or compensation, except as otherwise provided in this act." It thereupon abolishes civil actions and civil causes of action for personal injuries incurred in extra-hazardous employments, and the jurisdiction of the courts thereon, except as in the act provided.

Section 2 enumerates what the legislature deems extra-hazardous employments. It is provided, however, that if there be found to be, or if there subsequently arise, any hazardous employments not enumerated, the same shall nevertheless come within the provisions of the act, and the rate of contribution to the accident fund to be exacted from such employments shall be fixed by the department therein created until the legislature itself shall have acted thereon. The enumeration includes all classes of business and employments in which machinery is employed, whether conducted by corporations or by individuals, and whether they are affected with a public interest or are purely of a private nature.

Section 3 defines certain of the words and terms used in the act. Concerning the word "workman" is the following: "Workman means every person in this State, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in § 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he

being in the course of his employment, away from the plant of his employer: Provided, however, that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the State for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the State may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department. Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the average salary or wage named in such pay roll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman."

Section 4 contains a schedule of contributions. It recites that, in so much as industry should bear the greater proportion of the burden of the costs of its accidents, each employer shall, prior to January 15 of

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each year, pay into the state treasury, in accordance with a schedule provided, a sum equal to a percentage of his total pay roll of that year. Then follows a classification of the different industries and the rate per centum each several class shall be required to pay; the amounts varying as the legislature deemed the risk of injury therefrom varied, and the greater hazard contributing the larger percentage. The fund created is termed the "accident fund," and it is provided that it shall be devoted exclusively to the purposes specified in the act. A scheme is provided for replenishing the fund in case an amount collected shall be insufficient to meet the demands upon it. It is also provided: "If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay roll of each occupation if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employés and the relative hazards. If an employer besides employing workmen in extrahazardous employment shall also employ workmen in employments not extrahazardous the provisions of this act shall apply only to the extrahazardous departments and employments and the workmen employed therein. In computing the pay roll the entire compensation received by every workman employed in extrahazardous employment shall be included, whether it be in form of salary, wage, piecework, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise."

Section 5 contains the compensation schedule. It provides that each workman who shall be injured,

whether upon the premises or at the plant, or being in the course of his employment away from the plant of his employer, or his family or dependents in case of the death of the workman, shall receive out of the accident fund compensation in accordance with the schedule provided, and except as in the act otherwise provided such compensation shall be in lieu of any and all rights of action whatsoever against any person whomsoever. This schedule provides for monthly payments to dependents of the workman in case the injury results in death, varying according to their number and degree of relationship, and to the workman direct in case the injury results only in disability; the amount varying according to the proportion the extent of such disability bears to a fixed maximum.

Section 6 relates to intentional injuries and the status of minors engaged in hazardous employments. It is provided that, if injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, no compensation shall be made either to the workman or his dependents out of the accident fund. If, however, the injury or death results to a workman from the deliberate intention of his employer, such workman, or, in case of his death, a widow, widower, child, or dependent of the workman, shall have the privilege to take under the act, and shall also have a cause of action against the employer, as if the act had not been enacted, for any excess of damage over the amount received, if receivable under the act. A minor working at an age legally permitted under the laws of the State shall be deemed *sui juris* for the purposes of the act, and no other person shall have any cause of action or right to compensation for his injury.

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Section 7 provides for converting the monthly payments into corresponding lump sums according to the American mortality tables. Section 8 provides penalties for defaulting employers. Section 9 relates to injuries caused by the absence of safeguards required by statute.

Section 10 exempts awards made under it from assignment, or from seizure under legal proceedings.

Section 11 provides that no employer of workmen shall exempt himself from the burden or waive the benefits of the act by any contract, agreement, rule, or regulation, and that any such contract, agreement, rule or regulation shall be *pro tanto* void.

Section 12 relates to the filing of claims; § 13 to medical examinations; § 14 to the notice required of the happening of accidents; § 15 to an inspection of any employer's books. Section 16 provides a penalty for misrepresentation as to the amount of the pay roll. Section 17 relates to public contract work. Section 18 contains provisions relating to interstate and intrastate commerce, and § 19 provides that the provisions of the act may be adopted by employers and employés engaged in nonhazardous employments.

Section 20 relates to court reviews. It provides that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department created to administer the terms of the act affecting his interest may have the same reviewed by a proceeding for that purpose in the nature of an appeal, initiated in the Superior Court of the county of his residence, in so far as such decision rests upon questions of fact or of the proper application of the provisions of the act; "it being the intent that matters resting in the discretion of the department shall not be subject to review." It

is provided further that the appeal shall be informal and summary. No bond shall be required, and any decision of the Superior Court may be referred to the Supreme Court for review according to existing laws applicable to other civil causes. The calling of a jury is within the discretion of the court, except that, in cases occurring under §§ 9, 15 and 16, of the act, each party shall be entitled to a trial by jury on demand.

Section 21 vests the administration of the act in a department to be known as the "Industrial Insurance Department," to consist of three commissioners to be appointed by the Governor. It is provided that a decision of any question arising under the act concurred in by two commissioners shall be deemed the decision of the department, and each member thereof is given power to issue subpoenas requiring the attendance of witnesses and the production of books and documents.

Section 22 relates to the salary of the commissioners, and § 23 to the appointment of deputies and assistants. Section 24 further defines the duties of the commissioners in relation to the administration of the act. Section 25 relates to medical examinations, and § 26 to the manner in which funds appropriated to the use of the department shall be disbursed.

Section 27 provides: "If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workman, or if any workman shall be adjudicated to be outside the lawful scope of this act because of remoteness of his work from the hazard of his employer's work, any such adjudication shall not impair the validity of this act in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys

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received. If the provisions of § 4 of this act for the creation of the accident fund, or the provisions of this act making the compensation to the workman provided in it exclusive of any other remedy on the part of the workman shall be held invalid the entire act shall be thereby invalidated except the provisions of § 31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this act shall not affect the validity of the act as a whole or any other part thereof."

Section 29 appropriates out of the general fund in the state treasury the sum of \$150,000, to be known as an "administration fund," out of which the salaries, traveling, and office expenses of the department shall be paid, together with all the expenses of administration of the accident fund; and out of the accident fund is appropriated \$1,500,000 to be applied to the purposes for which such fund is applicable. The remaining sections relate to the administration, and define and limit the effect and operation of the act, and need no special reference to their contents.

The foregoing summary makes clear the theory and purpose of the act. It is founded on the basic principle that certain defined industries called in the act extra-hazardous should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any of such industries, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received. With the economic questions

thus suggested, the auditor's learned counsel object only to the wisdom of the scheme formulated. They concede that the evil is one calling for a remedy, and direct their arguments solely against this particular act. In our discussion we shall confine ourselves to the questions thus suggested, noticing the economic questions only incidentally.

The act is challenged as unconstitutional on four distinct grounds: (1) That it violates § 3 of article 1 of the state constitution, and the Fourteenth Amendment to the Constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law; (2) that it violates § 12 of article 1 of the state constitution, which provides that no law shall be passed granting to any citizen, class of citizens, or corporations, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations; and the Fourteenth Amendment to the Constitution of the United States, which provides for the equal protection of the laws; (3) that it violates §§ 1 and 2 of article 7 of the state constitution, which provide that property shall be taxed according to its value in money and that all taxation shall be equal and uniform; and (4) that it violates § 21 of article 1 of the state constitution, which provides that the right of trial by jury shall remain inviolate. But, while we shall discuss the questions suggested under the several divisions as here set out, it is obvious that no very logical segregation of the argument can be thus made, as many of the reasons advanced for or against the act under one particular division are equally applicable to one or more of the others. Any different arrangement, however, seems

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to be at the sacrifice of clearness, and we pass therefore directly to the first objection stated.

It is with regret that we are unable to set forth at length counsel's argument on this branch of the case, as any abbreviation of it is at the expense of its cogency and force. To do so, however, would unduly lengthen this opinion. The argument is based on two fundamental ideas: The one, that the act creates a liability without fault; and, the other, that it takes the property of one employer to pay the obligations of another. It must be conceded that these contentions have a basis in fact, and that they, on first impression, constitute a persuasive argument against the validity of the act. Since there is exacted from every employer of labor engaged in one or more of the industries termed hazardous a certain fixed sum based upon his pay roll, which is to be used to compensate employes working in such hazardous employments who receive personal injuries, regardless of the question whether the injury was because of the fault of the employer or of the negligence of the employé, it can be said that some part of the sum so collected will be paid out on injuries in which the employer is without fault; and, furthermore, since every such employer is liable to make the payments whether or not any of his own workmen are injured, and since an employer is liable under the common law for an injury to his own workmen only, it can also be said that by this act one employer is held liable for the obligations of another.

But these conditions do not furnish an absolute test of the validity of the act. In the statute books of the several States are many statutes held constitutional by the courts where liability is created without fault,

and where the property of one person is taken to pay the obligations of another, and this where no compensation is made to the person who is thus made liable or whose property is thus taken, other than perhaps the bestowal upon him of some privilege. The test of the validity of such a law is not found in the inquiry: Does it do the objectionable things? But is found rather in the inquiry: Is there no reasonable ground to believe that the public safety, health, or general welfare is promoted thereby? The legislature cannot, of course, without violating this clause of the Constitution, declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employés engaged in it, the people surrounding it, or to any considerable number of the people at large, no matter from whatsoever cause the menace may arise. This it does under the police power—"the power inherent in every sovereignty, * * * the power to govern men and things." It is unnecessary to discuss the origin, nature, or extent of this power. It is sufficient to say that, by means of it, the legislature exercises a supervision over matters affecting the common weal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it the State may "prescribe regulations promoting the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the

State, develop its resources, and add to its welfare and prosperity." In fine, when reduced to its ultimate and final analysis, the police power is the power to govern. It is not meant here to be asserted that this power is above the Constitution, or that everything done in the name of the police power is lawfully done. It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the State, and is not in violation of any direct and positive mandate of the Constitution. The clause of the Constitution now under consideration was intended to prevent the arbitrary exercise of power, or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society. In other words, the test of a police regulation, when measured by this clause of the Constitution, is reasonableness, as contradistinguished from arbitrary or capricious action.

The authorities, as we view them, abundantly support the foregoing principles. Of statutes upheld by the courts which can be said to create liability without fault and take the property of one person to pay the obligations of another, the most conspicuous examples are, perhaps, §§ 4588 and 4803 of the Revised Statutes of the United States, which provide:

"Sec. 4585. There shall be assessed and collected by the collectors of customs at the ports of the United States, from the master or owner of every vessel of the United States arriving from a foreign port, or of every registered vessel employed in the coasting trade, and before such vessel shall be admitted to entry, the sum

of forty cents per month for each and every seaman who shall have been employed on such vessel since she was last entered at any port of the United States; such sum such master or owner may collect and retain from the wages of such seamen."

"Sec. 4803. The several collectors of the customs shall respectively deposit, without abatement or reduction, the sums collected by them under the provisions of law imposing a tax upon seamen for hospital purposes, with the nearest depository of public moneys, and shall make returns of the same, with proper vouchers, monthly, to the Secretary of the Treasury, upon forms to be furnished by him. All such moneys shall be placed to the credit of 'the fund for the relief of sick and disabled seamen,' of which fund separate accounts shall be kept in the treasury. Such fund is appropriated for the expenses of the marine-hospital service, and shall be employed, under the direction of the Secretary of the Treasury, for the care and relief of sick and disabled seamen employed in registered, enrolled and licensed vessels of the United States." U. S. Comp. St. 1901, p. 3322.

This statute clearly does everything that is charged against the statute at bar. It creates liability without fault, since it obligates the master or owner of every vessel of the United States to pay into a given fund, controlled by the government, a fixed sum for the benefit of sick and disabled seamen, regardless of the fact whether or not the vessel of the master or owner making the payment has any sick or disabled seamen who take advantage of the fund; and it takes the property of one to pay the obligations of another, since the fund is disbursed in the cure of sick and disabled Amer-

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ican seamen generally, regardless of the fact whether or not the expense of their cure exceeds the sum paid in by the master or owner of the vessel from which they came. Whatever may be said as to the foundation of the liability of the master or the owner of a vessel, or the vessel itself, to answer for the expenses of the cure of sick and disabled seamen while in service on the ship, the foundation of this liability is purely statutory, and, if the objection that is made to the present statute were sufficient to condemn it, the statute is in violation of the Fifth Amendment to the Constitution of the United States. The statute had its inception in the act of Congress of July 16, 1798, Chapter 77, 1 Stat. 606, and was on the statute books for nearly 100 years, during which time it was continuously enforced. It is true our attention has been called to no case where the statute was directly attacked; but there are numerous cases in which it has been specifically mentioned and given force, and it would seem that, if it were thought inimical to the Constitution, it would not have escaped the attention of the astute counsel whose client's interests were adversely affected by it. *Buckley v. Brown*, Fed. Cas. No. 2,092; *Reed v. Canfield*, Fed. Cas. No. 11,641; *Peterson v. The Chandos* (D. C.), 4 Fed. Rep. 645; *Holt v. Cummings*, 102 Pa. 212, 48 Am. Rep. 199. See, also, 3 Ops. Attys. Gen. (U. S.) 683; 13 Ops. Attys. Gen. (U. S.) 330.

Statutes making railroad corporations absolutely liable, without regard to negligence, for injuries to property caused by fires escaping from their locomotive engines, are clearly statutes creating liability without fault, yet these statutes have been upheld by all the courts of the States in which they have been enacted, as

well as by the Supreme Court of the United States. *Chapman v. Atlantic & St. Lawrence R. R. Co.*, 37 Me. 92; *Sherman v. Maine Cent. R. R. Co.*, 86 Me. 422; 30 Atl. 69; *Hooksett v. Concord R. R. Co.*, 38 N. H. 242; *Smith v. Boston & Maine R. R. Co.*, 63 N. H. 25; *Lyman v. Boston & Worcester R. Corp.*, 4 Cush. (Mass.) 288; *Pierce v. Worcester & Nashua R. R. Co.*, 105 Mass. 199; *Rodemacher v. Milwaukee & St. P. R. R. Co.*, 41 Iowa, 297; 20 Am. Rep. 592; *Mathews v. St. Louis & San Francisco R. R. Co.*, 121 Mo. 298; 24 S. W. 591; 25 L. R. A. 161; *Emerson v. Gardiner*, 8 Kan. 452; *Jensen v. South Dakota Cent. R. R. Co.*, 25 S. D. 506; 127 N. W. 650; *St. Louis & San Francisco R. R. Co. v. Mathews*, 165 U. S. 1; 17 Sup. Ct. 243; 41 L. Ed. 611; *Atchison, T. & S. F. R. R. Co. v. Matthews*, 174 U. S. 96; 19 Sup. Ct. 609; 43 L. Ed. 909. Other statutes are those providing that any landlord who knowingly leases his premises for saloon purposes shall be liable for losses resulting from intoxication caused by the sale of liquor by his lessee. Such a statute was formerly in force in this State, and was given effect by this court. *Delfel v. Hanson*, 2 Wash. 194; 26 Pac. 220; *Burkman v. Jamieson*, 25 Wash. 606; 66 Pac. 48. And in *Bertholf v. O'Reilly*, 74 N. Y. 509; 30 Am. Rep. 323, the constitutionality of a like statute was maintained in an opinion by Judge ANDREWS renowned for its ability and learning. In the course of his opinion, the learned judge noted the fact that the liability of the landlord could not be sustained on the theory that such liability was a condition of a privilege granted by the statute, but rested the decision on the principle that the State, under its police power, could impose upon the landlord liability for the acts of his tenants. In the course of the opinion this

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language was used: "And the act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. * * * The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's acts connected with the use of the leased property."

Statutes imposing a liability upon fire insurance agents, based upon the amount of the insurance effected by them, for the benefit of a fund to care for and cure sick and injured firemen, have been upheld in the States of New York and Illinois. *Fire Department v. Noble*, 3 E. D. Smith (N. Y.), 440; *Fire Department v. Wright*, 3 E. D. Smith (N. Y.), 453; *Exempt Fireman's Fund v. Roome*, 29 Hun (N. Y.), 391, 394; *Firemen's Benevolent Assn. v. Lounsbury*, 21 Ill. 511; 74 Am. Dec. 115. Clearly these are statutes creating liability without

fault. A similar statute relating to agents of foreign fire insurance companies was upheld in Wisconsin. *Fire Department v. Helfenstein*, 16 Wis. 136.

The statute of Nebraska makes a railroad company liable in damages for injuries sustained by a passenger regardless of the question of negligence on the part of the company, except where the injury is caused by the passenger's criminal negligence, or by his violation of some express rule of the company, actually brought to his attention. This statute was upheld against a challenge on the ground that it violated the due process of law clauses of the state and Federal constitutions, by the state court, in *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb. 689; 82 N. W. 26; 55 L. R. A. 610, and by the Supreme Court of the United States in *Chicago, R. I., etc., Ry. Co. v. Zerneck*, 183 U. S. 582; 22 Sup. Ct. 229; 46 L. Ed. 339. The Supreme Court of the United States, vindicating the statute against the attack made upon it, used the following language: "In *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143; 49 N. W. 1114, the words of the statute exempting railroad companies from liability, 'where the injury done arose from the criminal negligence of the persons injured,' were defined to mean 'gross negligence,' 'such negligence as would amount to a flagrant and reckless disregard' by the passenger of his own safety, and 'amount to a willful indifference to the injury liable to follow.' This definition was approved in subsequent cases. It was also approved in the case at bar, and the plaintiff in error, it was in effect declared, was precluded from any defense but that of negligence as defined, or that the injury resulted from the violation of some rule of the company by the passenger brought to his actual

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notice, and the company, as we have said, was not permitted to introduce evidence that the derailment of its train was caused by the felonious act of a third person. The statute, thus interpreted and enforced, it is asserted, impairs the constitutional rights of plaintiff in error. The specific contention is that the company is deprived of its defense, and not only declared guilty of negligence and wrongdoing without a hearing, but adjudged to suffer without wrongdoing, indeed even for the crimes of others, which the company could not have foreseen or have prevented. Thus described, the statute seems objectionable. Regarded as extending the rule of liability for injury to persons which the common law makes for the loss of or injury to things, the statute seems defensible. And it was upon this ground that the Supreme Court of the State defended and vindicated the statute. The court said: 'The legislation is justifiable under the police power of the State, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers as they were of baggage and freight; and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight.' Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of a master for the acts of his servants. In

Missouri Railway Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. 1161; 32 L. Ed. 107, a statute of Kansas abrogating the common-law rule exempting a master from liability to a servant for the negligence of a fellow servant was sustained against the contention that such statute violated the Fourteenth Amendment of the Constitution of the United States. And in *Minneapolis, etc., Railway Co. v. Herrick*, 127 U. S. 210; 8 Sup. Ct. 1176; 32 L. Ed. 109, a statute of Iowa which extended liability for the 'willful wrongs, whether of commission or omission,' of the 'agents, engineers or other employés' of railroad companies, was vindicated against the double attack of being an unjust discrimination against railroad corporations and the deprivation of property without due process of law."

The latest illustration of such a statute is found in the Oklahoma Depositors' Guaranty Law, which authorizes the assessment and collection of a certain per centum on the daily average deposit of each and every bank organized under the laws of the State as a fund to pay the losses caused depositors by failing and insolvent banks. This act was challenged in the state court on the ground that it violated the Fourteenth Amendment to the Constitution of the United States, and the due process of law clause of the state constitution, but was upheld by the state court, and on writ of error to the Supreme Court of the United States the judgment of the state court was affirmed. *Noble State Bank v. Haskell*, 22 Okla. 48; 97 Pac. 590; *Noble State Bank v. Haskell*, 219 U. S. 104; 31 Sup. Ct. 186; 55 L. Ed. 000, 32 L. R. A. (N. S.) 1062. Answering the objection that the act takes private property for a private use, and creates a liability without fault, the

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Supreme Court of the United States said: "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S. 361; 25 Sup. Ct. 676; 49 L. Ed. 1085; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 531; 26 Sup. Ct. 301; 50 L. Ed. 581; *Offield v. New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372; 27 Sup. Ct. 72; 51 L. Ed. 231; *Bacon v. Walker*, 204 U. S. 311, 315; 27 Sup. Ct. 289; 51 L. Ed. 499. And, in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190; 20 Sup. Ct. 576; 44 L. Ed. 729. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

Illustrations of the nature and all-pervading extent

of the police power are shown somewhat in the cases already cited. Other illustrations abound almost without number in the decisions of the state and Federal courts. It will be sufficient for our purposes, however, to call attention to a few of those which most clearly, as we believe, illustrate the doctrine. In *Lawton v. Steele*, 152 U. S. 133; 14 Sup. Ct. 499; 38 L. Ed. 385, the court used this language: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature

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to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Again, in *Holden v. Hardy*, 169 U. S. 366; 18 Sup. Ct. 383; 42 L. Ed. 780, it was said: "An examination of both these classes of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes, in this country at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though, so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit

of her American colonies let it be said that so oppressive a doctrine had never obtained a foothold there. The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the States homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the States grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority. This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado v. California*, 110 U. S. 516; 4 Sup. Ct. 111, 292; 28 L. Ed. 232. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance

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may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."

So in *Noble State Bank v. Haskell*, *supra*, Mr. Justice HOLMES said: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518; 17 Sup. Ct. 864; 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits; to such an extent do checks replace currency in daily business. If then the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make

safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386; 12 Sup. Ct. 255; 35 L. Ed. 1051. The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S. 183, 188; 20 Sup. Ct. 633; 44 L. Ed. 725. So far is that from being the case that the device is a familiar one. It was adopted by some States the better part of a century ago, and seems never to have been questioned until now. *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 92; *People v. Walker*, 17 N. Y. 502. Recent cases going not less far are *Lemieux v. Young*, 211 U. S. 489, 496; 29 Sup. Ct. 174; 53 L. Ed. 295; *Kidd, Dater & Price Co. v. Musselman Grocer Co.*, 217 U. S. 461; 30 Sup. Ct. 606; 54 L. Ed. 839. It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are

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pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355; 28 Sup. Ct. 529; 52 L. Ed. 828. It will serve as a datum on this side that in our opinion the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Loan Association v. Topeka*, 20 Wall. 655; 22 L. Ed. 455; *Lowell v. Boston*, 111 Mass. 454; 15 Am. Rep. 39."

It is argued, however, that the statutes above referred to can be supported on principles not applicable to the statute before us. First, it is said that the statutes creating absolute liability on railroad companies for losses caused by fires from their locomotive engines are in themselves but a return to the common law as it originally existed. But this does not meet the objection. At the time the common law became a rule of action for the American States, the doctrine that negligence or fault of some kind was a necessary element of liability was as firmly imbedded in it as was any other of its tenets, and to create liability regardless of negligence is now as fundamental a change in the common law as it would be had the rule always remained as it now is. Again, it is said that the right to use the agencies of fire and steam in the movement of trains is derived from legislation by the State, and the State can, for that reason, prescribe such limitations upon and annex such conditions to its use as it may deem fit and necessary to protect from injury those who come in contact with it. But the premise here assumed is not strictly accurate. The use of fire and steam to propel trains is not in itself unlawful. On the contrary,

it is as much a natural right as is the right to propel them by any other means or to engage in any other lawful enterprise. Hence the power to regulate and interfere with the right must come from some source other than the inherent unlawfulness of the act itself. It is not meant to be said, of course, that the State, when it grants a charter to a railroad company empowering it to construct and operate a railroad within its boundaries, may not annex to the charter such conditions as it pleases. But that is not the question here. The question is: Whence comes the power to impose these additional burdens upon a railroad corporation by legislative fiat after it has received its charter and has constructed and is operating its road thereunder? Unless the Constitution or the act granting the charter itself expressly reserves such right, the legislature cannot materially change the charters of railroad companies after it has once granted them. The power to annex additional conditions thereto must therefore be found in some other power than the one here alluded to. Then, again, it is said with reference to these and the bank guaranty statutes that the corporations named therein are affected with a public interest, and that this fact renders them subject to regulations that they would not otherwise be subject to. But again we say that the legislature, because of this public interest, may be warranted in imposing such a condition as a precedent right to engage in the business of railroading or banking, but it furnishes no reason for imposing additional conditions after the business has been entered upon with the consent of the State. The property of such institutions is private property, and its ownership is as secure and free from arbitrary exac-

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tions as is the property invested in enterprises of a more private nature. Of the statutes making the landlord liable for damages caused by the sale of intoxicating liquors by his tenant, it is said that the traffic is unlawful in itself; that "whisky is an outlaw," and hence the legislature, if it permits its sale at all, may prescribe the terms upon which sales shall be made. But here again the assumption is not in accord with the fact. The sale of liquor was not unlawful at common law. On the contrary, it has been said by as high an authority as the Supreme Court of the United States that the State could no more exclude "its importation and sale in original packages without the consent of Congress than it could exclude the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products natural or manufactured of any State." *Lyng v. Michigan*, 135 U. S. 161; 10 Sup. Ct. 725; 34 L. Ed. 150. It refused to classify intoxicating liquors with rags or other goods infected with disease, or with cattle or meat or other provisions which from their condition are unfit for human use or consumption, as it was conceded that the State could prohibit the importation and use of these in any form, with or without the consent of Congress. It seems to us, therefore, that it cannot be successfully controverted that all of these statutes rest upon the same basic principle on which the statute at bar rests; that is to say, they have their foundation in the police power of the State.

Nor is it sufficient to exclude the industries mentioned in the act before us from the operation of these principles to say that they are lawful callings, not sub-

ject to absolute prohibition. As we have said in another place, lawful trades and businesses, although private in their nature, are subject to the police power, and may be controlled and regulated under it whenever the welfare of the State requires it. This is well illustrated by the laws of our own State. For example, the statute requiring employers of labor to pay their employés in lawful money; the statute requiring employers of female help in stores or offices to provide each of them with a chair or stool on which to rest when their duties permit; the statute prohibiting the employment of females in any mechanical or mercantile establishment, laundry, hotel, or restaurant, for more than ten hours in any one day; the statute limiting the number of hours an employé will be permitted in any one day to work underground in a coal mine; the statute requiring machinery in factories, mills, and workshops, the openings of all hoistways, hatchways, elevators, and well-holes, to be guarded; the statute appointing a commissioner of labor, and empowering him to inspect mills and factories and charge the cost thereof to the mill or factory inspected—are all statutes regulating lawful trades or businesses not affected with public interests, yet each and all of them have been upheld and enforced in a long line of cases by this court. *State v. Buchanan*, 29 Wash. 602; 70 Pac. 52; 59 L. R. A. 342; 92 Am. St. Rep. 930; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415; 81 Pac. 869; *Shortall v. Puget Sound Bridge & Dredging Co.*, 45 Wash. 290; 88 Pac. 212; 122 Am. St. Rep. 899; *Hall v. West & Slade Mill Co.*, 39 Wash. 447; 81 Pac. 915; *Whelan v. Washington Lumber Co.*, 41 Wash. 153; 83 Pac. 98; 111 Am. St. Rep. 1006.

The Supreme Court of the United States, in *Sentell v.*

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New Orleans, etc., Railroad Co., 166 U. S. 698; 17 Sup. Ct. 693; 41 L. Ed. 1169, speaking of the power of the State to interfere with private property, used this language: "That a State in a *bona fide* exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits, and vegetables do not cease to become private property by their decay; but it is clearly within the power of the State to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass."

The power to regulate, therefore, applies alike to all employments. The test of the power is found in the effect the pursuit of the calling has upon the public weal rather than in the inherent nature of the calling itself.

In *Allgeyer v. Louisiana*, 165 U. S. 578; 17 Sup. Ct. 427; 41 L. Ed. 832, the court, referring to the Fourteenth Amendment to the Constitution of the United States, said: "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the

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right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

It is thought the act at bar interferes with certain of the personal rights here defined, particularly with the right of contract, and is for that reason violative of this provision of the Constitution. But it is recognized in the case cited, and in many others, that these rights are not absolute. On the contrary, it has been many times said that there is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses; that the term "liberty" means absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. The principle was thus stated in *Frisbie v. United States*, 157 U. S. 160; 15 Sup. Ct. 586; 39 L. Ed. 657: "A second objection, insisted upon now as it was by demurrer to the indictment, is that the act under which the indictment was found is unconstitutional, because interfering with the price of labor and the freedom of contract. This objection also is untenable. While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for

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the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services or property."

Again, in the case of *Holden v. Hardy*, 169 U. S. 366; 18 Sup. Ct. 383; 42 L. Ed. 780, the court, holding constitutional the statute of the State of Utah fixing the number of hours a workingman should be permitted to work continuously in underground mines, used this language: "This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employés as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases of *Davidson v. New Orleans*, 96 U. S. 97; 24 L. Ed. 616, and *Yick Wo v. Hopkins*, 118 U. S. 356; 6 Sup. Ct. 1064; 30 L. Ed. 220, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of

public nuisances, and a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.'"

So in *State v. Buchanan*, 29 Wash. 602; 70 Pac. 52; 59 L. R. A. 342; 92 Am. St. Rep. 930, this court, holding constitutional the act limiting the number of hours women could be required to work in one day in mechanical and mercantile establishments, said: "Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. In the early history of the law, when employments were few and simple, the relative conditions of the citizen and the State were different, and many employments and uses which were then considered inalienable rights have since, from the very necessity of changed conditions, been subjected to legislative control, restriction, and restraint. This all flows from the old announcement made by Blackstone that when man enters into society, as a compensation for the protection which society gives to him, he must yield up some of his natural rights, and, as the responsibilities of the government increase, and a greater degree of protection is afforded to the citizen, the recompense is the yielding of more individual rights. Transportation companies are now controlled and restricted, where a few years ago they claimed the right to transact their business exactly as it suited their private interests. The practice of medicine is restricted and controlled. Laws against quackery and empiricism are enforced without question. The sale of

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liquor, which formerly was a legitimate business, and which the citizen had a right to enter into, as he did any other business, without any restrictions, has now become subject to the control of the State, or to actual prohibition at the will of the State. The changing conditions of society have made an imperative call upon the State for the exercise of these additional powers, and the welfare of society demands that the State should assume these powers, and it is the duty of the court to sustain them whenever it is found that they are based upon the idea of the promotion and protection of society.'

If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights.

That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accidents in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent

financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the State at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically and morally sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern statesmen, jurists and economic writers who have voiced their opinion on the subject; and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form at least by one or more of South American republics. Indeed, so universal is the sentiment that to assert to the contrary is to turn the face against the enlightened opinion of mankind. The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases—cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument.

Passing to the second objection, it is well settled

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that neither the clause of the state constitution prohibiting class legislation, nor the clause of the Fourteenth Amendment to the Constitution of the United States relating to the equal protection of the laws, takes from the State the power to classify in the adoption of police regulations. The limitations imposed admit of a wide discretion in this respect, and avoid only what is done without any reasonable basis; that is, such regulations as are in their nature arbitrary. The learned counsel for the auditor recognize this distinction and consequently do not attack the act because it is confined to extrahazardous occupations as its field of regulation, but complain because its benefits are not confined to workmen injured while engaged in such occupations. It is claimed that the act allows workmen employed in such industries the benefit of the act when injured outside of the line of their duties, or when engaged in the business of the concern in a capacity not affected by the peculiar hazards of the business. We have quoted enough of the statute to show that it is somewhat obscure in these respects, but we are not inclined to think the point fatal to the act, even though we concede counsel's interpretation of it to be the correct one.

In § 27, the legislature has made it clear that it did not intend the provisions relating to those who are entitled to partake of its benefits to be so far an integral part of the act that it could not be eliminated in part without destroying the act in its entirety. It is there expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part thereof. This means that the legislature intended the act to be enforced as

far as it may be even though it might not be valid in its entirety. It was competent for the legislature so to provide. Anything it could have eliminated itself and left an operative act can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination. So here, if it be true that the legislature has gone too far in this direction, and has attempted to include within its benefits certain employes who cannot be included without including employes generally, these can be omitted in the administration of the act without the necessity of nullifying the entire act. But whether any such workmen are so improperly included we shall not here determine. The question can best be met when it arises during the course of the act's administration.

Again, it is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally or applying it to the use of the State at large. But to divert the money collected in this manner to a special use is one of the prerogatives of legislation.

The right of the State to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought

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in direct contact with it, even though its pursuit may benefit generally the people of the State at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or in a particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms, and a sum of money exacted from the individuals carrying it on for the purpose of recompensing those who suffer losses because thereof.

So, in this instance, if the legislature believed that, to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. That legislation in this form is not class legislation, nor a denial to owners of property of the equal protection of the laws, is well sustained by authority.

In *Jensen v. South Dakota Cent. Ry. Co.*, 25 S. D. 506; 127 N. W. 650, the court, discussing the question, used this language: "The exercise of the police power in this class of cases is based upon the ground that, where persons are engaged in a calling or business attended with danger to other persons and their property, then the legislature may step in and impose conditions upon the exercise of such calling or business for the general good and welfare of society, and may prescribe the terms on which such dangerous calling or business will be permitted to be carried on by persons in charge

thereof, whether such persons happen to be private individuals or railway corporations. The fact that such legislative exercise of the police power applies alike to all persons and all corporations engaging in such dangerous calling or business relieves it from the charge and contention that there is a denial of equal protection under the law by reason of such enactments."

In *Firemen's Benevolent Assn. v. Lounsbury*, 21 Ill. 511; 74 Am. Dec. 115, the court had under consideration a statute of the State of Illinois which created a corporation called the Firemen's Benevolent Association, and required every insurance agent in the city of Chicago to pay to the association a fixed percentage upon the amount of fire insurance premiums collected by him per year from fire insurance effected upon property in the city, to be used solely for the relief of distressed, sick, injured, or disabled firemen and their immediate families. Answering the objection that the act was void as class legislation, the court said: "There is nothing to be found in the Constitution which can be held to inhibit the legislature from imposing burdens, or raising money from citizens of the State, which is not for the direct benefit of the State, and is never designed to belong to the State. To deprive the legislature of this power would to a great extent destroy its usefulness—while it would to a certain extent deprive it of the power of abuse, it would destroy its power to regulate by law a thousand things, which the public good requires should be regulated by law. * * * Let us once hold that the legislature could not compel any citizen to submit to a burden, except for the benefit of the State aggregate, or for some subdivision of it, as a county, city, or town, or to pay any money except

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it shall go into the State or some subordinate public treasury, and we should soon find ourselves on the brink of anarchy itself—we should tie up the hands of the legislature, it is true, so that they might not do some evils which they have hitherto had the power of doing; but we should also let loose upon society 10,000 evils, which in every well-regulated community it has always been the duty of the legislature to suppress. It is in the exercise of this indispensable power that ferries, toll bridges, and the like are licensed or chartered. The legislature, finding it necessary to afford special encouragement to private enterprise to erect a bridge or a ferry, has ever exercised the power of imposing a burden on some, for the benefit of others. Whoever doubted the right of the legislature to charter a bridge and to require all persons crossing the stream within certain limits, to pay the tolls, whether they cross on the bridge or not? It is the exercise of the same power, which fixes the fees of officers for the performance of certain services. It is the power which the legislature possesses, of imposing burdens upon certain members of the community who are supposed to be benefited by the efforts or acts of certain other members of the community, as a reward or compensation for such acts. * * * It would fill a volume to enumerate all the familiar instances of the exercise of this power—a power which must be exercised constantly in every civilized community, or the well-being of that community must vitally suffer.”

In *State v. Cassidy*, 22 Minn. 312; 21 Am. Rep. 765, the court sustained an act which required the vendors of intoxicating liquors to pay a fixed sum per annum into the state treasury, in addition to the usual license

fee, as a fund to be disbursed by a state commission in the creation and operation of a state asylum for the care and cure of inebriates. The court in its opinion points out that the act is an exercise of police power, saying: "It regards the traffic as one tending to produce intemperance, and as likely, by reason thereof, to entail upon the State the expense and burden of providing for a class of persons rendered incapable of self-support, the evil influence of whose presence and example upon society is necessarily injurious to the public welfare and prosperity, and therefore calls for such legislative interposition as will operate as a restraint upon the business, and protect the community from the mischiefs, evils, and pecuniary burdens flowing from its prosecution. * * * That these provisions unmistakably partake of the nature of police regulations, and are strictly of that character, there can be no doubt, nor can it be denied that their expediency or necessity is solely a legislative, and not a judicial, question. * * * Regarding the law as a precautionary measure, intended to operate as a wholesome restraint upon the traffic, and as a protection to society against its consequent evils, the exacted fee is not unreasonable in amount, and the purpose to which it is devoted is strictly pertinent and appropriate. It could not be questioned but that a reasonable sum imposed in the way of an indemnity to the State against the expense of maintaining a police force to supervise the conduct of those engaged in the business, and to guard against the disorders and infractions of law occasioned by its prosecution, would be a legitimate exercise of the police power, and not open to the objection that it was a tax for the purpose of revenue, and therefore unconstitutional. Reclaim-

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ing the inebriate, restoring him to society, prepared again to discharge the duties of citizenship, equally promotes the public welfare, and tends to the accomplishment of like beneficial results, and it is difficult to see wherein the imposition of a reasonable license fee would be any the less a proper exercise of this power in the one case than in the other. The purpose to which the license fund created by the act is designated is more consonant to the idea of regulating the traffic and preventing its evils than is the case under the general license law, which devotes the fees received to common school purposes, and we are not aware that any objection has ever been urged against that law on that account."

A statute of Kentucky imposed upon all dogs a tax at a fixed sum per capita, to be paid by their owners, for the creation of a fund to be disbursed to sheep growers whose sheep should be injured or destroyed by the ravages of dogs. In *McGlone v. Womack*, 129 Ky. 274; 111 S. W. 688; 17 L. R. A. (N. S.) 855, this statute was challenged by a number of owners of dogs on the ground that it violated the state constitution. Answering the objection that it was class legislation the court said: "Nor do we think the act is inimical to that portion of § 3 of the Bill of Rights which provides: '* * * And no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services. * * *' As we view it, the statute does not confer any special privilege on the owner of sheep. It merely protects these owners from the destruction of their property by dogs. It is the duty of the State to protect every citizen in his life, liberty and property; and it certainly is within

the competency of the legislature to exercise the police power of the State to protect all property against the ravages of destructive animals. The question as to how this is to be done and what property is to be so protected is a matter of legislative discretion. Undoubtedly the sheep industry is a most important one to the whole State. All of our citizens are interested in any industry which supplies the market with wholesome meat, provides means of obtaining warm and comfortable clothing, and at the same time furnishes labor to the otherwise unemployed. It is only necessary to allude to this phase of the question. The importance of the industry as a whole is most obvious. It is equally obvious that sheep are peculiarly liable to the ravages of dogs. They have neither the fleetness to escape nor the courage to defend themselves from attack, and their silent suffering enables the dog to prey upon them without any danger that the owner will be warned of the destruction of his property by the outcry of the dying animal. * * * The fact that sheep are generally killed at night when it is impossible to ascertain the owner of the dog committing the ravage makes it necessary, if protection is to be had through this channel at all, that each owner of a dog should be required to contribute a small amount to a common fund dedicated to the remuneration of owners of sheep killed by unknown dogs. As said before, this is simply requiring the owners of dogs to make good the ravages of dangerous animals kept by them; and no citizen has just cause of complaint, if he keeps animals destructive to the property of others, that he is required to make good the damages done by them. The statute, in truth, is but an enforcement of the maxim, *Sic utere tuo ut alienum non*

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lædas, and, as such, its constitutionality is beyond successful question." See, also, *Leavitt v. Morris*, 105 Minn. 170; 117 N. W. 393; 17 L. R. A. (N. S.) 984; *Mitchell v. Williams*, 27 Ind. 62; *Van Horn v. People*, 46 Mich. 183; 9 N. W. 246; 41 Am. Rep. 159; *Cole v. Hall*, 103 Ill. 30; *Longyear v. Buck*, 83 Mich. 236; 47 N. W. 234; 10 L. R. A. 43; *Holst v. Roe*, 39 Ohio St. 340; 48 Am. Rep. 459; *State v. Frame*, 39 Ohio St. 399.

The foregoing cases, while defending the statute here in question against the charge of class legislation, are interesting from another aspect also. They furnish examples of constitutional statutes creating liability without fault. To effect insurance as an agent, to sell intoxicating liquors where not forbidden by the State, or to own and keep dogs, is not of itself unlawful, and it would seem that any reason which would justify the levying of a tax on persons pursuing these occupations as business callings, or owning and keeping the species of property mentioned, would justify the levy sought to be made by the act before us.

The third principal objection to the constitutionality of the act is that it violates the provisions of the Constitution designed to secure equal and uniform taxation of property for public purposes. As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority, it partakes of the nature of a tax and, in the language of a distinguished judge discussing a similar question, "for many purposes might be so spoken of without harm." But it is manifest that it is not a "tax" in the sense the word is used in the sections of the Constitution to which reference is here made. No accession to the public revenue, general or local, is authorized or

aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of government, but to recompense employes of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employment. It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is therefore in the nature of a license tax, and can be justified on the principle of law that justifies the imposition and collection of license taxes generally.

In this State, such taxes may be imposed, either as a regulation or for the purposes of revenue, the only limitation upon the power being that such taxes when imposed on useful trades and industries shall not be unreasonable, and if a class of trades or industries is selected from the whole, and the tax imposed upon the class selected alone rather than upon the whole, that there be some reasonable ground for making the distinction. *Walla Walla v. Ferdon*, 21 Wash. 308; 57 Pac. 796; *Fleetwood v. Read*, 21 Wash. 547; 58 Pac. 665; 47 L. R. A. 205; *Stull v. De Mattos*, 23 Wash. 71; 62 Pac. 451; 51 L. R. A. 892; *Seattle v. Barto*, 31 Wash. 141; 71 Pac. 735; *In re Garfinkle*, 37 Wash. 650; 80 Pac. 188; *Oilure Mfg. Co. v. Pidduck-Ross Co.*, 38 Wash. 137; 80 Pac. 276; *McKnight v. Hodge*, 55 Wash. 289; 104 Pac. 504.

The general rule governing the right to impose such license taxes is well stated by Judge BREWER in *Newton v. Atchison*, 31 Kan. 151; 1 Pac. 288; 47 Am. Rep. 486, in the following language: "Before noticing some specific objections which are made to this particular tax, we think it proper to state certain general propositions which underlie this matter of a license tax. First. In the absence of any inhibition, express or implied, in

the Constitution, the legislature has power, either directly to levy and collect license taxes on any business or occupation, or to delegate like authority to a municipal corporation. This seems to be the concurrent voice of all the authorities. In 1 Dillon on Municipal Corporations (3d Ed.), § 357, note, the author says: 'Unless specially restrained by the Constitution, the legislature may provide for the taxing of any occupation or trade, and may confer this power upon municipal corporations.' In Burroughs on Taxation, p. 148, is this language: 'Where the Constitution is silent on the subject, the right of the State to exact from its citizens a tax regulated by the avocations they pursue cannot be questioned.' In *Savings Society v. Coite*, 6 Wall. 606; 18 L. Ed. 897, the Supreme Court of the United States thus states the law: 'Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the state government.' *Hamilton Co. v. Massachusetts*, 6 Wall. 638; 18 L. Ed. 904; Cooley on Taxation, 384-392, 410. On page 384 the author observes: 'The same is true of occupations; government may tax one, or it may tax all. There is no restriction upon its power in this regard unless one is expressly imposed by the Constitution.' In *State Tax on Foreign-held Bonds*, 15 Wall. 300; 21 L. Ed. 179, FIELD, J., among other things, speaking of the power of taxation, says: 'It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of taxation may be determined by the value of the property, or its use, or its capacity, or its productive-

ness. It may touch business in the almost infinite forms in which it is conducted; in professions, in commerce, in manufactures, and in transportation. Unless restrained by the Constitution, the power as to the mode, forms, and extent of taxation is unlimited.' See, also, the authorities collected in *Fretwell v. City of Troy*, 18 Kan. 274. Nor does this rest alone upon a mere matter of authority. Full legislative power is, save as specially restricted by the Constitution, vested in the legislature. Taxation is a legislative power. Full discretion and control therefore in reference to it are vested in the legislature, save when specially restricted. There is no inherent vice in the taxation of avocations. On the contrary, business is as legitimate an object of the taxing power as property. Oftentimes a tax on the former results in a more even and exact justice than one on the latter. Indeed, the taxing power is not limited to either property or avocations. It may, as was in fact done during the late war and the years immediately succeeding, be cast upon incomes, or placed upon deeds and other instruments. We know there is quite a prejudice against occupation taxes. It is thought to be really double taxation. Judge DILLON well says that 'such taxes are apt to be inequitable, and the principle not free from danger of great abuse.' Yet, wisely imposed, they will go far toward equalizing public burdens. A lawyer and a merchant may, out of their respective avocations, obtain the same income. Each receives the same protection and enjoys the same benefits of society and government. Yet the one having tangible property pays taxes; the other, whose property is all in legal learning and skill, wholly tangible, pays nothing. A wisely-adjusted occupation tax equalizes

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these inequalities.' But, after all, these are questions of policy, and for legislative consideration. It is enough for the courts that both occupation and property are legitimate objects of taxation; that they are essentially dissimilar; that constitutional provisions regulating the taxation of one do not control that of the other; and that there are no constitutional inhibitions on the taxation of business, either by the legislature directly, or by municipal corporations, thereto empowered by the legislature. Second. There is no inhibition, express or implied, in our Constitution, on the power of the legislature to levy and collect license taxes, or to delegate like power to municipal corporations. It is not pretended that there is any express inhibition. It has been contended that § 1, article 11, creates an implied inhibition, and this because it reads that 'the legislature shall provide for a uniform and equal rate of assessment and taxation.' But that section obviously refers to property, and not to license taxes."

In *Fleetwood v. Reed*, *supra*, this court discussing the question whether taxation of this sort was prohibited by the Constitution, said: "It is insisted, also, that the ordinance is void because it imposes a burden upon a portion, and not the whole, of a class of merchants. We do not think this contention is tenable. The ordinance does apply to all merchants who see fit to engage in the business of buying tickets of that kind, and the constitutional provision (article 1, § 12) that no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal privileges, or immunities which, upon the same terms, shall not equally belong to all citizens or corporations, cannot be invoked against this ordinance. The adjudicated cases

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in this respect are so numerous that it is scarcely worth while to mention them here. The ordinance cannot be held void on account of excessive burden imposed. It is not so impressive that it will in any way interfere with the rights of merchants. However wrong the policy may be which prompted the enactment of this ordinance, or however doubtful the propriety of passing such an ordinance, those are questions which are submitted by the legislature to the discretion of the council, and upon them it is not our province to comment. We think, without further investigation, that there is no doubt that the ordinance is warranted by legislative authority. Some question was raised by the court at the time of the argument of this case in relation to the ordinance being in conflict with §§ 1, 2, and 9 of article 7 of the state constitution, which provide for uniformity in taxation. Counsel for the respondent was requested by the court to furnish it with a brief on that subject, which he did, and upon an examination of the cases cited and of other cases, we have become convinced that the question raised by the court was not a question pertinent in this case; that, under the great weight of authority a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provisions in relation to uniformity of taxation; and, in consideration of the fact that the state constitution is a limitation upon the actions and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions, and occupations is, in the absence of constitutional restriction, a matter within its absolute control and resting entirely in sound legislative discretion."

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The sums exacted from the several industries named we think may be treated as partaking both of the nature of a license for revenue and regulation; as such, however, we find nothing in the principle inimical to either the state or Federal constitutions.

The fourth principal reason for which the act is thought to be unconstitutional is that it interferes with the right of trial by jury. It is said that the legislature cannot fix a procrustean rule for the admeasurement of damages arising from injuries received by one in the employment of another, as the employer and the employé alike have the right to submit to a jury both the question of the right to recover for any such injury, and the question of the amount that may be recovered therefor. But we cannot think the rule absolute. It may be that the legislature cannot fix the amount of recovery, or provide for an absolute recovery, in all cases where one person is injured by another, regardless of the relation of the parties, or the question whether the injury is or is not the result of negligence; but it does not follow that it may not so provide where the injury happens in that class of employments subject to legislative regulation and control. If it be, as we have attempted to show, a proper regulation of hazardous industries to compel those engaged therein as owners or operators to pay a fixed sum into a fund to be used for the purpose of compensating the employés thereof for injuries received by them, it is difficult to understand why it is not also proper regulation to require the employés of such industries to accept a given sum for any injury they may receive while so engaged. The same power that authorizes the State to regulate the participation of the one in the particular industry would

seem to authorize it to regulate the participation of the other therein. Theoretically, of course, the employer and employé, on entering into a contract by which the one engages the services of the other, stand on the same plane, but in practice, as it is well known, this ideal condition very seldom exists. Greed and sagacity on the one side, and necessity and incapacity on the other, sometimes lead to contracts that create conditions little short of peonage; and our own reports abound with instances where men have been induced to work in situations so dangerous to life and limb that the wonder is not that some of them were injured, but rather that any of them escaped injury. Indeed, it is a common thing for an employer, in defense of an action of damages brought by his employé for injury received in such a situation, to urge that the dangers of the place were so obvious and apparent that the employé was guilty of contributory negligence for working therein. These conditions, we think, authorize the interference of the legislature. The grounds upon which the employer may be held to contribute to a fund for the relief of all injuries sustained by his employés, whatever the cause, we have already stated. The obligation of the employé to accept the conditions of the statute can rest on like grounds, namely, the welfare of the State. The relation being one of contract between employer and employé, the State may make it a condition of the contract that the employé shall accept a fixed sum for any injury he may receive while engaged in the employment, whether the injury be the result of the inherent dangers of the employment or the result of some fault of his employer.

There is of course no direct authority supporting the

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contention that the right of trial by jury may be thus taken away. There are, however, cases maintaining principles more or less analogous to the principle thus involved. Of these *State v. Buchanan*, 29 Wash. 602; 70 Pac. 52; 59 L. R. A. 342; 92 Am. St. Rep. 930, and *Holden v. Hardy*, 169 U. S. 366; 18 Sup. Ct. 383; 42 L. Ed. 780, are illustrative. In these cases it is held that the legislature may limit the number of hours a workman shall be permitted to labor in certain classes of employments, on the principle that to do so is to protect the health of the individual workman and thus contribute to the public welfare. If it be within the rule of the police powers of the State to interfere with the workman's personal freedom in this regard, it would seem to be no greater stretch of power to go one step further and provide that, if he be injured while so laboring, he shall receive a sure award in a limited sum as compensation for his injury and in lieu thereof shall forego his common-law action in damages therefor.

The common-law system of making awards for personal injuries has no such inherent merit as to make a change undesirable. While courts have often said that the question of the amount of compensation to be awarded for a personal injury is one peculiarly within the province of the jury to determine, the remark has been induced rather because no better method for solving the problem is afforded by that system, than because of the belief that no better method could be devised. No one knows better than judges of courts of *nisi prius* and of review that the common-law method of making such awards, even in those instances to which it is applicable, proves in practice most unsatisfactory. All judges have been witnesses to extravagant awards

made for most trivial injuries, and trivial awards made for injuries ruinous in the nature; and perhaps no verdicts of juries are interfered with so often by the courts as verdicts making awards in such cases. There is no standard of measurement that the court can submit to the jury by which they can determine the amount of the award. The test of reasonableness means but little to the ordinary juror. Unused as he is generally to witnessing the results of injuries, he is inclined to measure his verdict by the amount of disorder he observes, rather than by the actual amount of disablement the injury has caused. Nor is he aided in this respect by the testimony of medical experts. Conflicting as such testimony usually is, it tends rather to confuse than enlighten him. Perhaps the whole difficulty lies in the fact that the question is too much one of opinion, and not enough of fact. It must be remembered also that the remedy afforded by the common law, as we have elsewhere remarked, can be applied only in a limited number of cases of injury—cases where the injury is the result of negligence on the part of the employer, not contributed to by the employé. For the greater number of injuries the common law affords no remedy at all. For this unscientific system it is proposed to substitute a system which will make an award in all cases of injury, regardless of the cause or manner of its infliction; limited in amount, it is true, but commensurate in some degree to the disability suffered. The desirability of this substitution is unquestioned, and we believe that the legislature had the power to make it without violating any principle of the fundamental law.

The objection may be answered also in another way.

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The Constitution does not undertake to define what shall constitute a cause of action, nor to prohibit the legislature from so doing. The right of trial by jury accorded by the Constitution, as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with a cause of action in any case exists at all in the exercise of the police power of the State, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate.

The auditor also complains of the scheme adopted by the legislature for correcting the evils they have found to exist. It is said that the scheme is unduly cumbersome; that its administration will prove unnecessarily costly and burdensome to those whose interests are affected by it, and will lead to public and private abuses and consequent evils more dangerous to the State than the evil that it is sought to correct.

But the courts are slow to inquire into the mere wisdom of a statute. This question is so pre-eminently one for the lawmaking branch of the government that the courts will interfere only where there can be no two opinions as to the mischievous and evil tendencies of the act. The act in question here was framed by a commission composed of men eminent for their ability, who gave to the work extended consideration. It was selected by the legislature from among a number of proposed acts having a similar purpose submitted for

their examination, and this, too, after its evil tendencies had been fully pointed out by the representatives of the different interests to be affected by it. In the light of these facts, the court cannot do otherwise than put it to the test of practice. Moreover, the question becomes one of less importance when it is remembered that the sessions of the legislature are sufficiently close together to enable that body to correct any evil influence the enforcement of the act may have before it becomes unduly harmful.

In the foregoing discussion we have not referred to the decision of the Court of Appeals of the State of New York in the case of *Ives v. South Buffalo R. Co.*, 201 N. Y. 271; 94 N. E. 431, which holds the Workmen's Compensation Act of that State to be in conflict with the due process of law clause of the state constitution, and the Fourteenth Amendment to the Constitution of the United States. The case has, however, been the subject of extended consideration in the briefs of counsel, and it is urged upon by counsel for the auditor as conclusive of the questions at bar. The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds. The principle embodied in the statutes is, however, the same, and it must be conceded that the case is direct authority against the position we have here taken. We shall offer no criticism of the opinion. We will only say that notwithstanding the decision comes from the highest court of the first State of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the view there taken.

We conclude, therefore, that the act in question vio-

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lates no provision of either the state or Federal constitutions, and that the auditor should give it effect. Let the writ issue.

DUNBAR, C. J., and CROW, MORRIS, ELLIS, MOUNT, PARKER and GOSE, JJ., concur.

CHADWICK, J. (concurring):

This proceeding is prosecuted by the relator, a simple contract creditor of the State. There is no party in interest before us whose interest it is to challenge the act of the legislature. This is a moot case, pure and simple, and the right of the relator to recover is in no way affected by the constitutional questions raised by the parties and discussed by the court. The legislature having created the industrial insurance commission, its power to organize cannot be questioned by anyone who is not affected by the terms of the law, and such expenses as it may incur are proper charges against the State and may be collected without reference to the power of the commission to levy a tribute upon certain kinds of business, or to make disbursement of the funds under the provisions of the act.

Without questioning or discussing the conclusions of the court upon the first three propositions advanced, with all of which I agree, the fourth proposition should not now be decided for the very palpable reason that our decision is binding upon no one, not even upon the court. No one will contend that it is of any concern to a furniture dealer who is seeking to collect his account whether an injured workman is to be deprived of the right to submit his cause to a jury of his peers. The principle is too important to be mooted by the

court, for some day a real party in interest will be before us—either an employer who feels aggrieved at the operation of the law, or a workman who has received injuries which the accepted schedules will not compensate. And we will be put to the duty of deciding the case without reference to our present decision, so that the Federal questions involved may pass for final hearing to the Supreme Court of the United States.

The right to recover damages for personal injuries suffered in consequence of the negligence of another was an admitted right at common law, so that the question whether the Seventh Amendment to the Constitution of the United States, which preserves the right of trial by jury in all cases maintainable at common law which are begun in the courts of the United States, would not compel a Federal court to ignore our statute, and the consequent question, whether a party assessed could be compelled to contribute to the indemnity fund unless he is to be protected from all suits of like character, becomes most material, and it is to be hoped that we will have an early opportunity to meet these issues in a proper case.

That the people of the State of Washington can take away a right of action, or abolish the right of trial by jury, I have no doubt; but whether the legislature can do so without the warrant of the whole people expressed by way of amendment or repeal of §§ 3 and 21 of article 1 of the state constitution is a grave question which is not discussed in the opinion of the court. The right of trial by jury has ever been regarded as the very sinew of liberty. It was the cardinal principle of the great charter, and "it is worthy of note that all that is extant of the legislation of the Plymouth Colony for the first

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five years consists of the single regulation 'that all criminal facts, and also all manner of trespasses and debts between man and man, shall be tried by the verdict of twelve honest men, to be impaneled by authority, in form of a jury upon their oath.' 1 Palfrey's New England, 340." Cooley's Const. Limitations (6th ed.), p. 389, note.

The right is asserted in every state constitution. Section 21, *supra*, provides that "the right of trial by jury shall remain inviolate." No distinction is made between civil and criminal cases; indeed, the additional text would indicate that no distinction was intended. This guaranty has been held by this court to apply to all civil-law actions maintainable at common law. *State ex rel. Mullen v. Doherty*, 16 Wash. 382; 47 Pac. 958; 58 Am. St. Rep. 39. I am a firm believer in trial by jury and am of equal faith that the will of the people as declared in their written Constitution is binding upon legislatures as well as courts, until the people by like adoption express a contrary will. We should not decide otherwise except at the suit of a proper party.

The present law seems to be greatly to the advantage of the employer for whom an easy method of discharging an obligation to his injured employé is provided, but whether the legislature can take from the working-man his right to have the amount of his compensation fixed by an authority less than the very people, who have said "the right of trial by jury shall remain inviolate," is for future hearing.

I have not advanced these observations in the way of objections, for the result of the court's opinion is a consummation for which I have devoutly hoped; but to indicate merely that our decision upon the fourth

proposition—the right of trial by jury—is not settled by this decision and should not be so regarded, and further, in the event that it be finally held that a jury trial cannot be dispensed with, under our present Constitution, that the objection may be easily overcome without doing violence to the purpose or principle of the act, and without amendment to the Constitution, by providing that, in the event of a dispute as to the amount of compensation, a jury shall be called to try that issue, and that its verdict shall be conclusive.

Upon the fourth proposition, therefore, I reserve my opinion until such time as its expression will have the force of law.

There being no question that the relator has a right to recover the amount due on its account, it follows that the writ should issue.

STATE *ex rel.* WALLACE D. YAPLE *v.* D. S. CREAMER,
AS TREASURER OF THE STATE OF OHIO

(00 Ohio St. 000; 00 Cent. Rep. 000)

Constitutional law; Workmen's Compensation Act; police power; due process of law; trial by jury; freedom of contract; impairing obligation of contract; classification of industries

1. The Workmen's Compensation Act providing for a classification of certain industries where five or more workmen are employed, establishing a state insurance fund by premiums to be paid at the rate of ninety per cent by the employers and ten per cent by the workmen and creating a State Liability Board of Awards to administer such fund and providing that as to employers who do not accept the compensation principle that certain common-law defenses

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shall be abolished in actions by their workmen, is a valid exercise of the police power of the legislature and is not unconstitutional as taking private property without due process of law contrary to the Fourteenth Amendment of the Federal Constitution; nor is it invalid as violating the right to a trial by jury, nor that it deprives parties of the freedom of contract or impairs the obligation of contracts, nor that it makes an unjust and arbitrary classification of industries for the purposes of the statute.

The relator, a member of the State Liability Board of Awards, filed his petition in mandamus to compel the defendant treasurer to issue his warrant to pay an account for expenses incurred by relator as such member, and in performance of his duties under the law passed May 31, 1911, approved June 15, 1911, to "Create a State Insurance Fund for the benefit of injured, and the dependents of killed employés, and to provide for administration of such fund," etc.

Defendant has filed a demurrer to the petition and thus challenges the constitutionality of the act referred to

Mr. Timothy S. Hogan, attorney general, *Mr. C. D. Laylin*, *Mr. Frank Davis, Jr.*, *Mr. J. Harrington Boyd*, *Mr. W. D. Yapple*, *Mr. James I. Boulger*, *Mr. D. J. Ryan*, *Mr. J. L. Hampton* and *Mr. George B. Okey*, for relator.

Messrs. Lentz, Karns, Linton & Hengst, *Mr. S. H. Tolles*, *Mr. H. B. Arnold*, *Mr. H. H. McKeehan*, *Messrs. M. B. & H. H. Johnson*, *Mr. T. H. Hogsett*, *Messrs. Outhwaite, Linn & Thurman*, *Mr. D. N. Postlewaite*, *Mr. Theodore W. Reath*, *Mr. F. M. Rivings* and *Mr. Henry Bannon*, for respondent.

JOHNSON, J.:

The statute in question provides for the creation of a State Liability Board of Awards, which shall establish a state insurance fund, from premiums paid by employers and employés in the manner provided in the act. It provides a plan of compensation for injuries, not willfully self-inflicted, resulting from accidents to employés of employers, both of whom have voluntarily contributed to the fund in the proportion of ten and ninety per cent respectively. It applies only where the employer has five or more operators regularly in the same business or in or about the same establishment. An employer who complies with the act is relieved from liability to respond in damages at common law, or by statute, for injury or death of an employé who has complied with its provisions, except when the injury arises from the willful act of himself or officer or agent, or from failure to comply with any law or ordinance providing for the protection of life and safety of employés, in which event the employé or his representatives have their election between a suit for damages and a claim under the act. Employers of five or more who do not pay premiums into the fund are deprived in actions against them of the common-law defenses of the fellow-servant rule, the assumption of risk and of contributory negligence. Where the parties are operating under the act, the injured employé and his dependents in case of death, are compelled to accept compensation from the insurance fund in the manner provided, except in the cases above set forth.

The objections to the validity of the act are stated by different counsel at the bar, and in their briefs, under various heads. All of them are substantially

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comprised in the following: First. That it is an unwarranted exercise of the police power and directs the State to use public funds for private purposes. Second. That §§ 20-1 and 21-1 take private property without due process of law in contravention of §§ 15, 16 and 19 of article 1 of the constitution of Ohio, and the Fourteenth Amendment to the Constitution of the United States, in that it deprives employers of the defense of assumption of risk, and deprives the employé of part of his wages to be paid to the state insurance fund, of the right to sue for injuries sustained, of recourse to the courts and of a trial by jury. Third. That it deprives parties of the freedom of contract and impairs the obligations of contracts. Fourth. That it makes an unjust and arbitrary classification and does not affect all who are within its reason.

Sections 20-1 and 21-1 are as follows, viz.:

“Sec. 20-1. Any employer who employs five or more workmen or operatives regularly in the same business or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employé, whenever occurring, during the period covered by such premiums, provided the injured employé has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employé of his right of action as aforesaid.

“Each employer paying the premiums provided by this act into the state insurance fund shall post in con-

spicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employés of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted.

"Sec. 21-1. All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employés for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employés, and also to the personal representatives of such employés where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common-law defenses

"The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence."

The law was passed after a report referred to in the briefs of a commission appointed by the governor, in obedience to a statute passed for that purpose. The report was prepared after an exhaustive research into industrial conditions in many countries, and an examination of laws, which have been passed in the effort to improve such conditions. Substantially its conclusions are, that the system which has been followed in this country, of dealing with accidents in industrial pursuits, is wholly unsound, that there is an intelligent

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and widespread public sentiment which calls for its modification and improvement and that the general welfare requires it. That there has been enormous waste under the present system, and that the action for personal injuries by employé against employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problem which has resulted from modern industrialism. Conceding the desirability of improvement, of legislative and governmental action, and the good results in other countries which have no written constitution to limit the legislative power, we in this country have the problem of devising a plan which shall not infringe the fundamental law.

It is apparent, from a contemplation of the whole enactment and its scope and purpose, as well as of the participation of the State in its administration, that it must find its validity, if at all, in the police power of the State.

There is now (it can be fairly said) general concurrence in the meaning of the term "Police Power" and as to its extent.

Professor Freund in his work says at § 2: "The term 'Police Power' has never been circumscribed. It means at the same time a power and function of government, a system of rules and an administrative organization and force." And in § 3, after discussing its nature and aims, he says: "It will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, *i. e.*, capable of development."

In *The State ex rel. Monnett v. Pipe Line Co.*, 61 Ohio

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St. 520, as to the constitutionality of the Ohio Anti-Trust Law, it is said: "The definite proposition of counsel upon this point is that although the act is the exercise of legislative power, it transcends the provisions of the state and Federal constitutions, which render inviolable the rights of liberty and property, which include the right to make contracts. It would be difficult to place too high an estimate upon these guaranties, and they include the right to make contracts. But it is settled that these guaranties are themselves limited by the public welfare or the exercise of the police power."

In *Phillips v. State*, 77 Ohio St. 215, it is said: "It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals and best interest of the commonwealth may be done under the police power; and this implies that private rights exist subject to the public welfare. These principles are plainly recognized in Article XIV, § 1, of the Constitution of the United States, and article 1, § 19, of the constitution of Ohio."

The cases of *Noble v. Haskell*, 219 U. S. 104, and *Bank v. Dolley*, 219 U. S. 121, involved the constitutionality of laws enacted by Oklahoma and Kansas, in the exercise of the police power to establish bank depositors' guaranty funds created by levy on each of the banks. Objection was made that the tax was an appropriation of the property of one bank to pay the debts of another without due process of law. Mr. Justice HOLMES said: "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. * * * Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the

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other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. * * * It may be said in a general way that the police power extends to all the great public needs. *Canfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

We think it clear, that the objects and purposes as above set forth, which the legislature contemplated in the passage of the law in question, are sufficient to sustain the exercise of the police power, and the participation of the State in the manner provided. Whether the plan adopted is the most appropriate or best calculated to accomplish those objects are matters with which the court is not concerned and the law should not be held to be invalid unless clearly in violation of some provisions of the Constitution.

It is urgently insisted that while the law is apparently permissive and leaves its operations to the election of employers and employés, it is really coercive and upon this premise much persuasive argument against the validity of the law is based. This is an important question in the case.

An examination of the sections touching the questions made is here necessary.

After providing in § 20-1 that an employer who elects to comply with the act shall be relieved from liability to the employé at common law, or by statute (except as provided in § 21-2) it is then enacted in § 21-1,

"All employers who shall *not* pay into the insurance fund, etc., shall be liable to their employés for damages, etc., caused by the wrongful act, neglect or default of the employer, his agents," etc., and in such cases the defenses of assumption of risk, fellow servant and contributory negligence are not available. So that an employer who elects *not* to come into the plan of insurance may still escape liability if he is not guilty of wrongful act, neglect or default. His liability is not absolute as in the case of the New York statute hereinafter referred to. And it cannot be said that the withdrawal of the defenses of assumption of risk, fellow servant and contributory negligence as against an employer who does not go into the plan, is coercive, for such withdrawal is in harmony with the legislative policy of the State for a number of years past. The law known as the Norris law, passed in 1910, withdrew these defenses in the particulars covered by the law.

As to the employé, if the parties do not elect to operate under the act, he has his remedy for the neglect, wrongful act or default of his employer and agents as before the law was passed, and is not subject to the defenses named.

If the parties *are* operating under the act the employé contributes to an insurance fund for the benefit of himself or his heirs, and in case he is injured or killed, he or they will receive the benefit even though his injury or death was caused by his own negligent or wrongful act, not willful. And that is not all. Under § 21-2 if the parties *are* operating under the act and the employé is injured or killed, and the injury arose from the willful act of his employer, his officer or agent, or from failure of the employer or agent to comply with legal

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requirements, as to safety of employés, then the injured employé or his legal representative has his option to claim under the act or sue in court for damages.

Therefore, the only right of action which this statute removes from the employé is the right to sue for *mere negligence* (which is not willful or statutory) of his employer, and it is within common knowledge that this has become in actual practice a most unsubstantial thing. It is conceded by counsel that the particulars named in § 21-2 are such, as form the basis for a large portion of claims for personal injuries.

Many employers may elect to remain outside its provisions; it would not be strange if many do so. On the other hand, some workmen may feel disposed to do likewise in spite of what would seem to be to their manifest advantage in securing the benefits of the insurance. However, if there should be such general acceptance of and compliance with the statute as its framers hope for, so as to bring a large part of the labor employed in the industrial enterprises of the State within its influence and operation, that would not demonstrate its coercive character; on the contrary, it would justify the enactment. Naturally time and experience will disclose imperfections and inefficiencies in the plan, but if it should prove to be feasible, and appropriate in a general way, these imperfections can be corrected by the legislature. On account of the common law and statutory rights still preserved to the parties by this statute (as we have pointed out) in cases where the election is made to come under its provisions as well as not to do so, taken in connection with the advantage to each which the plan contemplates, we cannot say that the statute is coercive. As was said in

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the *Wisconsin* case: "Laws cannot be set aside upon mere conjecture or speculation. The court must be able to say with certainty that an unlawful result will follow." We do not see how any such thing can be said here. Every consideration of prudence and self-interest (things not easily associated with compulsion and coercion) would seem to lead an employé to voluntarily make the contribution and waiver contemplated.

Second: Does this statute take private property without due process of law and deny the guaranties of the constitution as claimed?

Perhaps no exact definition of "due process of law" has been agreed upon. Judge STORY defines it in his work on the Constitution, § 1935: "The right to be protected in life and liberty and in the acquisition of property under equal and impartial laws, which govern the whole community. This puts the State upon its true foundation, for the establishment and administration of general justice, justice of law, equal and fixed, recognizing individual rights and not impairing them." In *Cooley on Const. Lim.*, § 356, it is said: "Due process of law in each particular case, means such an exercise of the government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the classes of cases to which the one in question belongs."

The case of *Ives v. South Buffalo Railway Co.*, 201 N. Y. 271 (relied on by some of counsel), involved a statute different in many essentials from the Ohio law. Its controlling feature was that every employer engaged in any of the classified industries should be liable to a workman for injury arising in the course of the work by

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a necessary risk inherent in the business whether the employer was at fault or not and whether the employé was at fault or not, except when his fault was willful.

The court held the law invalid, as imposing the ordinary risks of a business (which under the common law the employé was held to assume) on the employer. The court states one of the premises on which it proceeds as follows: "When our constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another."

But that rule was not of universal application. At common law one may sustain such relation to the inception of an undertaking that he will be held liable for negligence in the progress of the enterprise, even though he have no part or connection with the negligent act itself which caused the injury. Such for instance, as where the owner of property contracts with an independent contractor to do work which though entirely lawful, yet has inherent probabilities of harm if negligently performed. The position in the line of causation which employers sustain in modern industrial pursuits is of course the basic fact on which Employers' Liability Laws rest.

As to the right to abolish the defense of assumption of risk, it is enough to say here that the great weight of authority is against the New York position and the position of such of the counsel in this case as insist on that rule. Some of counsel appearing against the validity of this law, concede the right to abolish the defenses referred to. The Supreme Courts of Massachusetts, Wisconsin and Washington have recently held in cases sustaining the validity of statutes similar to the one

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here attacked, that it is within the legislative power to abolish the defense referred to. *In re Opinion of Justices*, 96 N. E. Rep. 308 (Mass.); *Borgnis v. Falk*, 133 N. W. Rep. 209 (Wis.); *State v. Clausen*, 117 Pac. Rep. 1101 (Wash.).

Since the argument of this case the Supreme Court of the United States has decided the case of *Mondou v. N. Y., New Haven & Hartford Railroad Co.*, 223 U. S. 1, and has sustained the constitutionality of the Employers' Liability Law passed by Congress. The abolition of these rules was urged as an objection to the law. The court say: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113; *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *The Lottawanna*, 21 Wall. 558, 577; *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 417.

The recent case of *State v. Boone*, 84 Ohio St. 346, is cited as indicating limitations of the police power which apply here. The act involved in that case required the physician in attendance on a case of confinement to investigate and certify without compensation to certain facts which would not naturally come within the knowledge of the attending physician, and as to mat-

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ters wholly outside the scope of his professional duty. The court held the statute unconstitutional as to physician and midwife because of an unreasonable and arbitrary exercise of the police power. That was the proposition of law decided in that case and no other proposition was decided. The court was careful to point out in the opinion and also on application for rehearing that the State might require the physician to report to proper authority, facts which would come naturally under his observation in the line of his duty without compensation. Other matters referred to in the opinion were not included in the syllabus which stated the law decided by the court.

The court remarks that the police power inheres in the sovereignty. Its foundation "is the right and duty to provide for the common welfare of the governed." Manifestly the reasoning which led to the conclusion in that case that the statute had been passed by an unreasonable exercise of the police power can have no application here.

State v. Hubbard, 22 C. C. 253, affirmed without report, in 65 Ohio St. 574, and *State v. Guilbert*, 56 Ohio St. 575, involving the validity of statutes creating a teachers' pension fund and the Torrens law to establish an insurance fund for the protection of land titles concerned laws which were wholly compulsory with no element of choice and were not claimed to have been passed under the police power to cure undesirable public conditions but for mere private benefit. These cases can therefore have no relation to a plan adopted to promote the general welfare, the contributions to which are made after an election by the parties to participate in the undertaking.

It is urged by counsel opposing this law that the case of *Byers v. Meridian Printing Co.*, 84 Ohio St. 408, is of conclusive weight condemnatory of the legislation we are examining.

In that case it is ruled that an amendment to § 5094, Revised Statutes (changing the presumption of malice and burden of proof in actions for libel where retraction is made on demand, in the manner stated), is unconstitutional.

The decision was put on the ground that plaintiff was guaranteed his remedy by due course of law for an injury done in his land, goods, person or reputation, under article 1, § 16, constitution of Ohio. When the injury was done to the reputation of plaintiff by the libel, he was entitled to his constitutional remedy at law, but at the same time he was entitled to demand of the publisher a retraction of the libel. Therefore the legislature had no right to put him on his election as to two courses both of which he was entitled to follow.

The court is careful to declare that it is not disposed to question that a citizen may waive a constitutional right. But being compelled to elect between two rights, both of which a person is entitled to, has no resemblance to waiver. But under the law under investigation here as already shown, the right of action (for injury by willful act of the employer and for his failure to comply with requirements as to safety of employés) is still reserved to the employés. So that the only thing withdrawn by this law, and to which withdrawal he consents by his voluntary election to operate under the law, is his right of action for mere negligence, and in place of it he receives the substantial protections and privileges under the state insurance fund.

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It is stated in *Butt v. Green*, 29 Ohio St. 670, that persons may expressly or impliedly waive either constitutional or statutory provisions intended for their benefit and as above shown the court, in the *Byers* case, states it is not disposed to question that one may waive a constitutional right.

We think that in a case such as is presented here, in which the State itself has undertaken a great enterprise in the interest of the general good, and in the exercise of its police power, and presents to its citizens the option to join in the undertaking and receive its protection and benefit, on a right of action being withdrawn by the legislature, which experience has shown to be difficult of practical enforcement, while preserving the valuable and substantial kindred rights of action, it cannot be said that in such withdrawal there is a violation of the Constitution in the respects claimed. But it is insisted that the act delegates judicial power to the Board of Awards, and denies recourse to the courts and trial by jury.

Of course if the board is a court there is an end of the whole matter. The statute would be unconstitutional. For if the board is a court it has not been created in accordance with the manner provided by the Constitution.

We do not consider the Board of Awards a court, or invested with judicial power, within the meaning of the Constitution.

It is created by the act purely as an administrative agency to bring into being and administer the insurance fund, and the fact that it is empowered to classify persons who come under the law and to ascertain facts as to the application of the fund, does not vest it with judicial power within the constitutional sense.

Under our system the executive department of the government has many boards to assist in the administration of its affairs.

In *State v. Hawkins*, 44 Ohio St. 98, it is said: "What is judicial power cannot be brought within the ring-fence of a definition. It is undoubtedly power to hear and determine, but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power." The court then shows that many boards hear and determine questions affecting private as well as public rights, and quotes with approval from *State v. Harmon*, 31 Ohio St. 250: "The authority to ascertain facts and apply the law to the facts when ascertained pertains as well to other departments of government as to the judiciary."

These principles were applied in *France v. State*, 57 Ohio St. 1, in which case the court remark that the case of *State v. Guilbert*, 56 Ohio St. 576, forms no exception, for the powers of the recorder under the statute there in question were essentially those which properly belonged to a court. Does the law deny recourse to the courts and trial by jury?

How does it affect an injured employé where the parties are operating under the act? In *Railroad Co. v. Stankard*, 56 Ohio St. 232, which was a suit by the beneficiaries of a member of the relief department of the railroad, the company answered setting up a rule which provided that the decision of the relief department should be final. The court says, "The right to appeal to the courts for redress of wrongs is one of those rights which in its nature under our constitution is inalienable and cannot be thrown off or bargained away."

Ohio

But the court shows that parties may contract to submit the fixing of facts to some nonjudicial tribunal and say: "In insurance and other like cases where the ultimate question is the payment of a certain sum of money, certain facts may be fixed by a person selected for that purpose in the contract, but the ultimate question as to whether the money shall be paid or not may be litigated in the courts and a stipulation to the contrary is void."

So that under that rule the parties may conclusively bind themselves in advance to submit questions of amount, etc., to some tribunal other than a court, but the ultimate question of actual liability cannot be removed from the courts.

Now, in this statute, § 36 is as follows:

"Sec. 36. The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final.

"Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund * * * upon any * * * ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the state liability board of awards, and he shall be notified by the clerk forthwith of the filing of such appeal.

"Within thirty days after filing his appeal, the ap-

pellant shall file a petition in the ordinary form against such board as defendant."

Therefore, if the board denies the claimant's right to participate in the fund on any ground going to the basis of his claim, he may by filing an appeal and petition in the ordinary form be entitled to trial by jury, the case proceeding as any other suit.

It is not an appeal in the sense of appealing from one court to another, but is really the beginning of an original suit.

As to this it must be remembered that the whole proceeding is with and against the Board of Awards. His claim is not against the employer. There is no dispute between them. His (the employé's) claim is for the benefits of the insurance fund. The Board of Awards inquire into the matters pointed out in the statute, and in case of dispute as to whether there is any ultimate right to "participate at all in such fund" he has his recourse to the courts.

But he is not confined to that method of proceeding. If he claims that the injury was caused by the willful act of the employer or officer or agent or from failure to comply with legal requirements as to safety of employes, etc., he may waive his claim under the act and sue in court for his damages. But in his petition in such case he could not claim damages for mere negligence, he having elected to waive that cause of action, having elected, as it were, to assume the risk of his employer's *mere* neglect in return for the benefits and protection to himself and his heirs afforded by the terms of the act.

Another objection that is urged against this statute is, that it makes an unjust and arbitrary classification

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and does not affect all who are within its reason as required by § 26, article 2, of the constitution of Ohio. Under the law only employers of five or more are affected by it.

SPEAR, J., in *Steinkamp v. Cincinnati*, 54 Ohio St. 295, remarked: "In order to be general and uniform in operation, it is not necessary that the law should operate upon every person in the State, nor in every locality; it is sufficient, the authorities concede in holding, if it operates upon every person brought within the relation and circumstances provided for, and in every locality where the condition exists."

To same effect are *Platt v. Craig*, 66 Ohio St. 75; *Gentsch v. State*, 71 Ohio St. 151; *Railway Co. v. Hosterman*, 72 Ohio St. 107.

We think the classification is reasonable and proper. In the nature of the case the risks of any regular employment are less and the opportunity for avoiding them better where an employé is one of four than when the number is larger. As was said by WINSLOW, C. J., in *Borgnis v. Falk*, *supra*, "The difference in the situation is not merely fanciful—it is real."

Coal Co. v. Illinois, 185 U. S. 203, is a case in which a classification was made under somewhat similar manner, and was upheld.

Nor do we think it an objection that the law applies only to workmen and operatives and not to all others. This classification brings within the law all employés within its reason.

As to the suggestion that this statute impairs the obligations of contracts it is sufficient to say that it can of course not affect contracts in existence and unexpired at the time it is put into operation by any employer.

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It is suggested that this legislation makes a radical step in our government policy not contemplated by the Constitution, and which it is the duty of the court to condemn. But it creates no new right or new remedy for wrong done.

It is an effort to in some degree answer the requirements of conditions which have come in an age of invention and momentous change.

The courts of the country, while firmly resisting encroachment on the constitutions in the past, have yet found in their ample limits, sufficient to enable us to meet the emergencies and needs of our development, and we do not find that this statute goes beyond the bounds put upon the legislative will.

The act entitled "An act to create a state insurance fund for the benefit of injured and the dependents of killed employés," etc., 102 O. L. 524, is a valid exercise of legislative power not repugnant to the Federal or state constitutions, or to any limitation contained in either.

The demurrer to the petition will be overruled and the writ of mandamus awarded.

SPEAR, PRICE AND DONAHUE, JJ., concur.

Decided February 6, 1912.

SECOND EMPLOYERS' LIABILITY CASES ¹

223 U. S. 1

MONDOU *v.* NEW YORK, NEW HAVEN & HARTFORD
RAILROAD Co. (p. 788)

ERROR TO THE SUPREME COURT OF ERRORS OF THE
STATE OF CONNECTICUT

NORTHERN PACIFIC RAILWAY Co. *v.* BABCOCK (p. 789)

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA

NEW YORK, NEW HAVEN & HARTFORD RAILROAD Co.
v. WALSH (p. 790)

WALSH *v.* NEW YORK, NEW HAVEN & HARTFORD
RAILROAD Co. (p. 790)

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS

Nos. 120, 170, 289, 290. Argued February 20, 21, 1911.—Decided
January 15, 1912

The Employers' Liability Act of April 22, 1908, 35 Stat. 65,
c. 149, as amended April 5, 1910, 36 Stat. 291, c. 143,
regulating the liability of common carriers by railroad to
their employés is constitutional.

Congress may, in the execution of its power over interstate
commerce, regulate the relations of common carriers by
railroad and their employés while both are engaged in
such commerce.

Congress has not exceeded its power in that regard by

¹ Reprinted from the official report, 223 U. S. 1.

prescribing the regulations embodied in the Employers' Liability Act.

Those regulations have superseded the laws of the several States in so far as the latter cover the same field.

Rights arising under the regulations prescribed by the act may be enforced, as of right, in the courts of the States, when their jurisdiction, as fixed by local laws, is adequate to the occasion.

Congress, in the exertion of its power over interstate commerce, and subject to the limitations prescribed in the Constitution, may regulate those relations of common carriers by railroad and their employés which have a substantial connection with interstate commerce and while both carriers and employé are engaged therein.

A person has no property—no vested interest—in any rule of the common law. While rights of property created by the common law cannot be taken without due process, the law as a rule of conduct may, subject to constitutional limitations, be changed at will by the legislature.

Under the power to regulate relations of employers and employés while engaged in interstate commerce, Congress may establish new rules of law in place of common-law rules including those in regard to fellow servants, assumption of risk, contributory negligence, and right of action by personal representatives for death caused by wrongful neglect of another.

In regulating the relations of employers and employés engaged in interstate commerce, Congress may regulate the liability of employers and employés for injuries caused by other employés even though the latter be engaged in intrastate commerce.

The power of Congress to insure the efficiency of regulations ordained by it is equal to the power to impose the regulations; and prohibiting the making of agreements by those

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engaged in interstate commerce which in any way limit a liability imposed by Congress on interstate carriers does not deprive any person of property without due process of law, or abridge liberty of contract in violation of the Fifth Amendment.

Quære: Whether an element of the due process provisions of the Fifth Amendment is the equivalent of the equal protection provision of the Fourteenth Amendment.

A classification of railroad employés, even if including all employés, whether subjected to peculiar hazards incident to operation of trains or not, is not so arbitrary or unequal as to amount to denial of equal protection of the laws. Such a classification does not violate the due process clause of the Fifth Amendment even if equal protection is an element of due process.

State legislation, even if in pursuance of a reserved power, must give way to an act of Congress over a subject within the exclusive control of Congress.

Until Congress acted on the subject, the laws of the several States determined the liability of interstate carriers for injuries to their employés while engaged in such commerce; but Congress having acted, its action supersedes that of the States, so far as it covers the same subject. That which is not supreme must yield to that which is.

The inaction of Congress on a subject within its power does not affect that power.

Rights arising under an act of Congress may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion.

When Congress, in the exertion of a power confided to it by the Constitution, adopts an act, it speaks for all the people and all the States, and thereby establishes a policy for all, and the courts of a State cannot refuse to enforce the act on ground that it is not in harmony with the policy of that State. *Clafflin v. Houseman*, 93 U. S. 130.

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A state court cannot refuse to enforce the remedy given by an act of Congress in regard to a subject within the domain of Congress on the ground of inconvenience or confusion. The systems of jurisprudence of the State and of the United States together form one system which constitutes the law of the land for the State.

The United States is not a foreign sovereignty as regards the several States but is a concurrent and, within its jurisdiction, a paramount sovereign. *Clafin v. Houseman*, 93 U. S. 130.

Existence of jurisdiction in a court implies the duty to exercise it notwithstanding such duty may be onerous.

82 Connecticut, 373, reversed, 173 Fed. Rep. 494, affirmed.

No. 120 (*Mondou v. New York, New Haven & Hartford Railroad Co.*).

This was an action by a citizen of Connecticut against a railroad corporation of that State to recover for personal injuries suffered by the plaintiff while in the defendant's service. The injuries occurred in Connecticut August 5, 1908, the action was commenced in one of the Superior Courts of that State in October following, and the right of action was based solely on the act of Congress of April 22, 1908 (35 Stat. 65, c. 149). According to the complaint, the injuries occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States and while the plaintiff, as a locomotive fireman, was employed by the defendant in such commerce, and the injuries proximately resulted from negligence of the plaintiff's fellow servants, who also were employed by the defendant in such commerce. A demurrer to the complaint was interposed upon the grounds, first, that the act of Congress was repugnant in designated aspects

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to the Constitution of the United States, and, second, that even if the act were valid a right of action thereunder could not be enforced in the courts of the State. The demurrer was sustained, judgment was rendered against the plaintiff, the judgment subsequently was affirmed by the Supreme Court of Errors of the State (82 Connecticut, 373) upon the authority of *Hoxie v. N. Y., N. H. & H. R. Co.*, 82 Connecticut, 352, and the plaintiff then sued out the present writ of error.

No. 170 (*Northern Pacific Railway Co. v. Babcock*).

This was an action by the personal representative of a deceased employé of a railroad corporation to recover, for the exclusive benefit of the surviving widow, for the death of the employé, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Montana, September 25, 1908, the action was commenced in the Circuit Court of the United States for the District of Minnesota, October 4, 1909, and the right of action was based solely on the act of Congress before mentioned. It appeared, from the complaint, that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States, and while the deceased, as a locomotive fireman, was employed by the defendant in such commerce; that the injury proximately resulted from negligence of fellow servants of the deceased, who also were employed by the defendant in such commerce; that the deceased resided in Montana and died without issue or a surviving father or mother, but leaving a widow and also a sister, and that if the statutes of Montana were applicable the recovery should be for the equal benefit of the widow and

sister, and not for the exclusive benefit of the widow, as prayed in the complaint and as provided in the act of Congress. The defendant challenged the validity of the act by a demurrer to the complaint, and in the subsequent proceedings insisted that the recovery, if any, should be for the benefit of the widow and sister jointly and not for the benefit of the widow alone, but the demurrer and the insistence were overruled and judgment was rendered for the plaintiff for the exclusive benefit of the widow, as prayed. By a direct writ of error the defendant seeks a reversal of that judgment.

Nos. 289, 290 (*Walsh v. New York, New Haven & Hartford R. R. Co.*; *New York, New Haven & Hartford R. R. Co. v. Walsh*).

These writs of error relate to the judgment in a single case. It was an action by the personal representative of a deceased employé of a railroad corporation to recover, for the benefit of the surviving widow and children, for the death of the employé, which resulted from an injury suffered in the course of his employment. The injury and death occurred in Connecticut, February 11, 1909, the action was commenced in the Circuit Court of the United States for the District of Massachusetts in July following and the right of action asserted in the second count of the declaration was based on the act of Congress before mentioned. There were several other counts, but they may be passed without special notice. It was charged in the second count that the injury occurred while the defendant, as a common carrier by railroad, was engaged in commerce between some of the States and while the deceased, in the course of his employment by the defendant in such

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commerce, was engaged in replacing a drawbar on one of the defendant's cars then in use in such commerce, and that the injury proximately resulted from negligence of fellow servants of the deceased in pushing other cars against the one on which he was working. A demurrer to that count challenged the validity of the act of Congress, but the demurrer was overruled. The defendant answered, putting in issue all that was stated in that count, and also alleging that the deceased, by his own negligence, contributed to the injury which resulted in his death and therefore that the damages should be diminished in proportion to the amount of negligence attributable to him. A trial to the court and a jury resulted in a verdict and judgment for the plaintiff upon the second count, and there was a judgment for the defendant upon the other counts. Each party has sued out a direct writ of error from this court. The defendant calls in question the ruling upon its demurrer and other rulings in the progress of the cause, notably such as related to the nature of the employment in which the deceased and the fellow servants whose conduct was in question were engaged at the time of the injury and to the admeasurement of the damages. The plaintiff makes no complaint of the judgment upon the second count and, if it shall be affirmed, wishes to waive her objections to the judgment upon the other counts.

The act whose validity is drawn in question, 35 Stat. 65, c. 149, and the amendment of April 5, 1910, 36 Stat. 291, c. 143, are as follows:

“An Act Relating to the liability of common carriers by railroad to their employés in certain cases.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

“SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting

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in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

“SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé; *Provided*, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé.

“SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employes, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé.

“SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against

any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"SEC. 7. That the term 'common carrier' as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employés under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled 'An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employés' approved June eleventh, nineteen hundred and six.

"Approved April 22, 1908."

"An Act to Amend an Act entitled 'An Act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress

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assembled, That an Act entitled 'An Act relating to the liability of common carriers by railroad to their employes in certain cases,' approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

"SEC. 2. That said Act be further amended by adding the following section as section nine of said Act:

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury.

"Approved, April 5, 1910."

Mr. Donald G. Perkins for plaintiff in error in No. 120:
The act of 1906 was held unconstitutional by this

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court because it could not by construction write into the act words to make it read, "Any employé *when engaged in interstate commerce*," which express words of limitation if contained in the act, it was conceded, would have rendered it constitutional. Congress in passing the act of 1908 adopted this suggestion and used express words of limitation to meet the views of the court.

So far as the substantive right goes the act of 1908 does not differ from the act of 1906 and was within the power of Congress under the decision of this court, and it is unnecessary to cite the cases and repeat the argument there considered. Thornton Employers' Liability Acts, §§ 7, 10 *et seq.*; *Employers' Liability Cases*, 207 U. S. 463; and see *Adair v. United States*, 208 U. S. 178.

The power to create the liability necessarily includes the power to change any and all rules in existence in relation to the liability of master to servant at common law or under state statutes.

Even the rules of the common law limited the power of the carrier to free itself entirely by contract from liability for its negligence in the carriage of passengers and freight, and the legislative power of Congress, assuming the matter is within its sphere, includes the right to change these rules of the common law and create a new and different rule. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Stevens*, 95 U. S. 655; *Liverpool S. S. Co. v. Phœnix Ins. Co.*, 129 U. S. 397; *Employers' Liability Cases*, 207 U. S. 492; *United States v. D. H. R. R. Co.*, 213 U. S. 405.

There is no violation of constitutional privilege, because the act applies to railroad interstate carriers alone. *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205.

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The act of Congress did not create an original jurisdiction in the Superior Court but it did create a substantial right which accrued to a citizen of Connecticut, and the Superior Court as a court of general jurisdiction had jurisdiction to adjudicate the right. *Ex parte McNeil*, 13 Wall. 423; *Cook v. Whipple*, 55 N. Y. 164; *Clafin v. Houseman*, 13 Wall. 137.

Congress intended that the state courts should exercise a concurrent jurisdiction, and that the jurisdiction of the Circuit Court shall be concurrent with that of the state courts in actions under this act, which was merely declaratory of the law as it existed. See amendment of 1910, Public No. 117, H. R. 17,263.

It was evidently the intent of Congress that the state court should have a concurrent jurisdiction, for unless this is so a party having a claim of less than \$2,000 would be without a remedy, for the Circuit Court of the United States has no jurisdiction where the damages claimed are less than \$2,000. See act, March 3, 1875, c. 137, § 1, 18 Stat. 470; § 969, U. S. Stat.; act of 1887-8; 24 Stat. 552 and 25 Stat. 443.

The power to regulate interstate commerce is one of the powers which the State surrendered to the United States, and assuming that the act in question is constitutional and within the power of Congress to regulate interstate commerce, then the power of Congress is supreme and paramount to that of the State and supersedes the law and policy of the State of Connecticut on the same subject, so that the State has no law and no policy on this subject except the act of Congress. *Sinnott v. Davenport et al.*, 22 How. 242; *Gulf &c. R. R. Co. v. Helfley*, 158 U. S. 98, 103; *Atl. &c. Tel. Co. v. Philadelphia*, 190 U. S. 160, 162; *Miss. R. R. Comrs. v. Ill.*

Central R. R., 203 U. S. 335; *El Paso &c. Ry. Co. v. Gutierrez*, 215 U. S. 87.

The oath of office of the judges of the Connecticut Supreme Court requires them to support the Constitution of the United States.

Even in enforcing transitory actions either in contract or tort arising under the laws of a foreign State, which is done as an act of comity between foreign States, the fact that the foreign law is different is not sufficient to prevent jurisdiction. *Walsh v. N. Y. & N. E. R. R. Co.*, 160 Massachusetts, 571; *Nor. Pac. Ry. Co. v. Babcock*, 154 U. S. 197; *Dennick v. R. R. Co.*, 103 U. S. 18.

Even if the plaintiff's right of action were to be treated as arising under the laws of a foreign State, the Connecticut court could not deny him a remedy from mere whim or because the judges did not like the law, but it could only be done on established principles of law governing all cases, that to grant him his remedy would be against the public policy or interests of the State, not simply against the interest of the defendant, and the following cases show that the conclusion of the court that it could not entertain jurisdiction was unsound and not in accord with established principles. *Dennick v. Railroad Co.*, 103 U. S. 18; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; *Huntington v. Attrill*, 146 U. S. 657; *Northern Pacific R. R. Co. v. Babcock*, 154 U. S. 190; *Ward v. Jenkins*, 10 Metc. 588; *Higgins v. Railroad Co.*, 155 Massachusetts, 176; *Walsh v. Railroad Co.*, 160 Massachusetts, 571; *King v. Sarria*, 69 N. Y. 31; *Leonard v. Columbia & Co.*, 84 N. Y. 48; *Stoeckman v. T. H. & R. R. Co.*, 15 Mo. App. 503; *C. & O. R. R. Co. v. Am. Ex. Bank*, 92 Virginia, 154.

But the plaintiff's case is much stronger than if he

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were suing under a foreign law because the whole foundation of the comity rule as to transitory actions is the principle that the law of a State has no extraterritorial force and therefore can be enforced not of right but only as an act of comity, while this plaintiff is a citizen of Connecticut and sues in the courts of his own State on a cause of action arising in the State under the act of Congress, which is the supreme law of Connecticut, and governs the public policy of the State on that point. *Blythe v. Hinckley*, 173 U. S. 508; *Claflin v. Houseman*, 93 U. S. 136.

This is a right under United States law just as much as is a discharge in bankruptcy granted by a court of the United States under the United States bankrupt law and such a discharge is valid in the courts of all the States, *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, and the denial of the right presents a Federal question. *Strader v. Baldwin*, 9 How. 261; *El Paso &c. Ry. Co. v. Gutierrez*, 215 U. S. 87. *St. Louis &c. R. R. Co. v. Taylor*, 210 U. S. 285, distinguished.

The Connecticut Supreme Court had no power to legislate or establish the public policy of the State but its duty was to declare the law and it was bound by the Constitution and laws of the United States. That the plaintiff was entitled to maintain his action in the state court is established by *Ex parte McNeil*, 13 Wall. 243; *Teal v. Felton*, 12 How. 292; *Claflin v. Houseman*, 93 U. S. 136; *Charlotte Nat. Bank v. Morgan*, 132 U. S. 141, 144; *Defiance Water Co. v. Defiance*, 191 U. S. 184; *Raisler v. Oliver*, 97 Alabama, 710; *Ordway v. Central Nat. Bank*, 47 Maryland, 245; *Schuyler Nat. Bank v. Bollong*, 24 N. W. 827; *Singer v. Bedstead Co.*, 65 N. J. Eq. 293; *Cook v. Whipple et al.*, 55 N. Y. 164; *People v.*

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Welch, 141 N. Y. 273; *Bletz v. Columbia Nat. Bank*, 87 Pa. St. 87; *Hartley v. United States*, 3 Hayw. (Tenn.) 45; *Kansas City &c. v. Flippo*, 138 Alabama, 487; *Mobile &c. Ry. v. Bramberg*, 141 Alabama, 258; *Wilson v. Southern Ry. Co.*, 172 Fed. Rep. 478.

Mr. Edward D. Robbins, with whom *Mr. Joseph F. Berry* was on the brief, for defendant in error in No. 120:

The power to regulate commerce among the several States is exclusive wherever the matter is national in its character or admits of one system or plan of regulation. *Cooley v. Board of Wardens*, 12 How. 319; *Welton v. Missouri*, 91 U. S. 280; *Kendall v. United States*, 12 Pet. 524, 618; *Valarnio v. Thompson*, 7 N. Y. 579.

There can be no question in this case that the act itself is national in its character and admits of only one system, which, to be effective, must be uniform in its application.

Where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself, but, if exclusive jurisdiction be neither expressed nor implied, the state courts have concurrent jurisdiction whenever by their own constitution they are competent to take it. *Claffin v. Houseman*, 93 U. S. 130. See also *Hoxie v. N. Y., N. H. & H. R. R. Co.*, 82 Connecticut, 356; *Chicago &c. R. Co. v. Whitton*, 13 Wall. 288; *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 521; *Teal v. Felton*, 12 How. 292; *Dallemagne v. Moisan*, 197 U. S. 174; *Robertson v. Baldwin*, 165 U. S. 278.

Congress cannot confer jurisdiction upon the state courts, *Martin v. Hunter*, 10 Wheat. 334; *Houston v. Moore*, 5 Wheat. 27; and state courts will not or cannot

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have jurisdiction of cases involving a penalty under United States laws. *Dudley v. Mayhew*, 3 N. Y. 9, 15; *Davidson v. Champion*, 7 Connecticut, 224; *State v. Curtiss*, 35 Connecticut, 374; *United States v. Lathrop*, 17 Johnson (N. Y.), 4, 8; *Ex parte Knowles*, 5 California, 301; Kent's Commentaries, * 399; *Rushworth v. Judges*, 58 N. J. L. 97.

As Congress cannot vest any of the judicial power of the United States in the state courts, it is bound to create inferior courts in which to vest jurisdiction in cases arising under its acts. These courts have been created and cases arising under the act should be tried in courts ordained and established by the Congress, which are adapted better to enforce the act in a uniform manner than courts established by the State.

While conceding that Congress may have intended the state courts to assume jurisdiction, Congress cannot compel the state court to entertain it against its wish.

The reservation of the States respectively by the Tenth Amendment means the reservation of the right of sovereignty which they respectively possessed before the adoption of the Constitution and which they had not parted from by that instrument; and any legislation by Congress beyond the limits of the power delegated would be trespassing upon the rights of the States or the people and would not be the supreme law of the land but null and void. *United States v. Williams*, 194 U. S. 295; *Ex parte Merryman*, 17 Fed. Cases, 9,487; *Collector v. Day*, 11 Wall. 124; *Calder v. Bull*, 3 Dallas (U. S.), 388.

Art. V, § 1, of the Connecticut constitution prescribes how the judicial power of the State shall be vested and exercised, and it cannot be within the power of Congress

to prescribe that a court of Connecticut must assume jurisdiction of a cause of action based upon an act the terms of which are entirely incompatible with its system of jurisprudence. Kent's Commentaries, 12th ed.* 403.

The power of the state courts to determine what cases they will accept jurisdiction of is absolute, for the power to maintain a judicial department is one incident to the inherent sovereignty of each State, in respect to which the State is as independent of the General Government as that Government is independent of the States. As to that power the two governments are on an equality. *Collector v. Day*, 11 Wall. 113, 126; *Stearns v. United States*, 2 Paine, 300; *Sherman v. Bingham*, Fed. Cases, No. 12,762; *Beavin's Petition*, 33 N. H. 89; *Stephens, Petitioner*, 4 Gray, 559; *In re Woodbury*, 98 Fed. Rep. 833.

The exercise of jurisdiction in this case in the state courts is entirely incompatible with the laws of the State and the act has been deemed to be both impolitic and unjust.

There are vital reasons why the state courts are not obliged to assume jurisdiction of this action and one of the principal reasons is that the act, to be enforced in the state courts, can be enforced only at the expense of disregarding many of the requirements of the law in Connecticut both in respect to pleadings and in respect to evidence.

Congress cannot provide rules of evidence which the state courts are bound to follow. *People v. Gates*, 43 N. Y. 40; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Moore v. Moore*, 47 N. Y. 467; *Bowlin v. Commonwealth*, 2 Bush (Ky.), 5; s. c., 92 Am. Dec. 468; *Carpenter v. Snelling*, 97 Massachusetts, 452.

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Mr. J. C. McReynolds, special assistant to the Attorney General, by leave of the court, filed a brief for the United States as *amicus curiæ* in No. 120.

The principles of law necessary for solving the questions in issue have been definitely determined by this court.

Congress has power to legislate concerning the mutual rights and liabilities of master and servant when both are actually engaged in interstate commerce. *Howard v. Illinois Central R. R. Co.*, 207 U. S. 463; *Adair v. United States*, 208 U. S. 161.

The Employers' Liability Act of 1906 was, in *El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S. 87, 96, declared valid so far as it relates to commerce within the Territories where the inhibitions of the Fifth Amendment apply with full force. *Rassmussen v. United States*, 197 U. S. 516. Objections predicated upon the Fifth Amendment, which are now urged against the act of 1908, apply with equal force to the earlier act, and therefore must be considered as overruled.

In *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, this court upheld the Carmack amendment as a proper regulation of interstate commerce and not in violation of the Fifth Amendment; and see *Mobile &c. Railroad Co. v. Turnipseed*, 219 U. S. 35; *L. & N. Railroad v. Melton*, 218 U. S. 36; *Griffith v. Connecticut*, 218 U. S. 572; *German Alliance Ins. Co. v. Hale*, 219 U. S. 307, as to general classification of railway employés being a proper exercise of the police power.

The relationship—the reciprocal rights and liabilities—between a railroad carrier and its employés arises out of agreement; and when both parties are actually engaged in interstate commerce this agreement is an

essential part thereof over which Congress has plenary power of regulation subject only to the restrictions of the Constitution. Beven on Employers' Liability, 3; Rueggs on Employers' Liability, 7th ed.; Mechem on Agency, § 1; Cooley on Torts, 531; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49, 56; *Priestley v. Fowler*, 3 Mees. & W. 1; *Murray v. So. Car. R. R. Co.*, 1 McMullan, 385; *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Chicago &c. Ry. Co. v. Ross*, 112 U. S. 377, 382; *Nor. Pac. R. R. Co. v. Herbert*, 116 U. S. 642, 647; *Nor. Pac. R. R. Co. v. Hambly*, 154 U. S. 349; Article by Prof. Mechem in *The Illinois Law Review*, November, 1909.

What constitutes interstate commerce and what is a regulation of it are practical questions to be decided in view of the rights involved in each case. *Dozier v. Alabama*, 218 U. S. 124. The operation of a railroad carrier in interstate commerce is impossible without servants—the human instrumentalities who must perform the necessary acts. The lack of power to control agreements with such servants by prescribing their terms or otherwise would result in inability completely and effectually to regulate the course and current of commerce as ordinarily conducted through the instrumentality of railroads. Congress has plenary power to regulate whatever is interstate commerce, subject only to the restrictions of the Constitution. *United States v. Delaware & Hudson Co.*, 213 U. S. 366.

In the absence of action by Congress, the States may legislate concerning the relationship—the rights and liabilities—between master and servant operating in interstate commerce. But the general subject is within the control of Congress whenever it may choose to exer-

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cise its power. *Martin v. Pittsburg &c. R. R.*, 203 U. S. 284, 294; *Sherlock v. Alling*, 93 U. S. 99, 103, 107; *Old Dominion S. S. Co. v. Gilmore*, 207 U. S. 398; *West. Un. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406.

State statutes have been upheld only where Congress left the matter untouched and open to state regulation. When the public good requires such legislation it must come from Congress and not from the States. *Hall v. De Cuir*, 95 U. S. 485; *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U. S. 71; *Louisville, N. O. & T. Ry. Co. v. Mississippi*, 133 U. S. 587; *Plessy v. Ferguson*, 163 U. S. 537, 540; *N. J. S. Co. v. Brockett*, 121 U. S. 637; *Hutchinson on Carriers* (3d ed.), §§ 997, 1077.

A contract for the transportation of goods between different States by vessel or railroad is a part of interstate commerce whose terms may be prescribed or regulated by act of Congress; *The Delaware*, 161 U. S. 459, 471; and as to the Harter Act, passed in 1893, see *Martin v. The Southwark*, 191 U. S. 1; *Patton v. T. & P. Ry. Co.*, 179 U. S. 658, 663.

As to the Carmack amendment, see *Atlantic Coast Line R. R. v. Riverside Mills*, 219 U. S. 186.

The contract for service between a sailor and a vessel engaged in foreign commerce is part thereof and its terms may be directly prescribed by Congress. *Patterson v. The Eudora*, 190 U. S. 169, 176; *Robertson v. Baldwin*, 165 U. S. 275.

Congress may prescribe the character of instruments to be used in interstate commerce and declare the result of a failure so to do upon the agreement of employment between master and servant. *Johnson v. So. Pacific Co.*, 196 U. S. 1; *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 205

U. S. 1; *St. Louis &c. Ry. Co. v. Taylor*, 210 U. S. 281, 294, 295.

Mr. Charles W. Bunn for plaintiff in error in No. 170:

Probably the interests of the railway company, plaintiff in error, would be promoted by having the act of Congress sustained, thus securing to it at least one uniform law of liability throughout the States in lieu of the differing laws of many States. But the fact cannot be ignored that for over a century it has been supposed that laws such as this fell within the exclusive power of the States, and that this view is held still by a large proportion of the bar and people. In fact, while defendant in error as administratrix is maintaining this action under this law, a sister of deceased, not a party to this action, asserts the liability of the railway company to her under the Montana statute.

The act of Congress rests wholly upon the power of Congress to regulate commerce among the States, which is the power to prescribe the rules by which commerce is to be governed. *Adair v. United States*, 208 U. S. 161, 177. See article by Mr. Hackett in *Harvard Law Review* for November, 1908. From the adoption of the Constitution until recently it has been understood universally that the exclusive power is in the States to say for what negligence a master shall be liable to a servant, what shall be the effect of the servant's contributory negligence, what shall be the master's liability for the acts of fellow servants, whether any pecuniary liability shall arise out of death caused by negligence, what shall be the measure of damage in death and other negligence cases, and who shall receive the fruits of recovery.

While the power of Congress is supreme in its sphere,

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it does not extend beyond those subjects which pertain immediately and directly to commerce. The utmost ingenuity has failed to prove how commerce will directly be promoted or affected, or the movement of goods or passengers by rail directly influenced, by any rule governing the master's liability to his servant for defects in appliances, or for the acts of fellow servants, or establish the effect of the servant's own negligence, or determining when a liability arises for negligent death, or the extent of the damages, or the persons to whom the damages shall go.

The act is plainly distinguishable from safety appliance laws and from laws prescribing tests for qualification of trainmen. Such laws have an obvious and direct relation to commerce. They make transportation both of passengers and freight safer and more reliable.

Congress may have authority to regulate in some respects the relation of master and servant, but it has no such authority except to make rules really and substantially affecting commerce, and the rules laid down in the act in question do not so affect commerce.

Regulation of liability for injury to an employé merely because the master is engaged in interstate commerce, or because the employé is so engaged, is inadmissible, the particular regulation not being a rule of commerce or having any relation to commerce; or at most such a shadowy and indirect relation as not to be a regulation of commerce within the power of Congress. *County of Mobile v. Kimball*, 102 U. S. 691; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *In re Rahrer*, 140 U. S. 545; *Robbins v. Shelby Taxing District*, 120 U. S. 489; *United States v. Knight Co.*, 156 U. S. 1; *Hooper v. California*, 155 U. S. 648.

The act of Congress probably conflicts with the law of every State, with some in one particular, with others in another. It would be impossible to enumerate such conflicts; but some of them are: in respect of the liability for the acts of fellow servants; in creating an action for death practically with unlimited damages; in distribution of proceeds in cases of recovery for death; in respect of the effect of contributory negligence and assumption of risk; in providing that no contract may be made between the parties contrary to the terms of the act; and in giving two years to bring action and in not requiring, as the laws of some States do, any preliminary notice to the defendant.

Congress has assumed to enter the field of the administration of deceased persons. In some States damages for death are not subject to the claims of creditors; in others it is believed that they are; but if this act is valid it seems to remove that question from state control. Some States give the damages to the heirs, some to the next of kin, and some to the widow. The rules in the States vary widely in determining who is an heir or next of kin entitled to share in the recovery.

In this particular case the law of Montana would give the damages half to the widow and half to the sister; but the act of Congress assumes to overrule these state statutes in the case at bar giving the whole damage to the widow to the exclusion of the sister, instead of dividing it between them.

Conflicts between the act of Congress and laws of the States result in annulling the acts of the States, providing that of Congress is valid, because if this is a regulation of commerce it is so well settled as now to be elementary, that Congress once having acted, state power over the

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whole subject (if indeed the States ever had any power) is ended; and any legislation by a State creating a liability of railway companies to their employés engaged in interstate commerce would be an unlawful interference with and burden upon such commerce. On this clear principle the plaintiff in error will not be liable to the sister of deceased, or to an administrator appointed for her benefit under the laws of Montana, provided this judgment is affirmed.

Plaintiff in error agrees with the Attorney General that railway companies have no employés who are not engaged in interstate commerce, unless indeed they carry on mining or some business apart from transportation. The whole line of a railroad extending through several States constitutes a single property and of necessity must be operated as such.

If the act in question is valid all employés of railways, at least all employed in or about the transportation carried on by railways, are taken out of the jurisdiction by the States of which they are citizens, to the extent of all the matters regulated by the act. The same will follow, if Congress chooses to act as to employés of manufacturers and merchants engaged in interstate commerce.

Mr. Samuel A. Anderson for defendant in error in No. 170:

Congress has power, under the commerce clause, to regulate the relation of master and servant as between an interstate carrier and an interstate servant. *Employers' Liability Cases*, 207 U. S. 463; *Adair v. United States*, 208 U. S. 161; *Gibbons v. Ogden*, 9 Wheat. 1, 196; *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U. S.

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87; *Peirce v. Van Dusen*, 78 Fed. Rep. 693; *The Daniel Ball*, 10 Wall. 557; *Gilman v. Philadelphia*, 3 Wall. 713, 724, 725; *United States v. Combs*, 12 Pet. 72, 78; *Cooley v. Board of Wardens &c.*, 12 How. 299; *Patterson v. Bark Eudora*, 190 U. S. 169.

Congress has the power to regulate the relation of master and servant as between an interstate carrier and an intrastate employé. See *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; *Minn. & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210; *Chicago, Kansas & Western R. R. Co. v. Pontius*, 157 U. S. 209; *Tullis v. Lake Erie &c. R. R. Co.*, 175 U. S. 348; *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368; *Minnesota Iron Company v. Kline*, 199 U. S. 593.

The power of Congress to regulate commerce between the States is as great as to regulate commerce with foreign nations, the power in both instances originating solely from the commerce clause. See *Brown v. Houston*, 114 U. S. 622; *Bowman v. Chicago &c. Ry. Co.*, 125 U. S. 465; *Crutcher v. Kentucky*, 141 U. S. 47; *Pittsburg & Southern Coal Co. v. Bates*, 156 U. S. 577.

The fact that the act declares that such common carriers shall be liable for injuries to interstate servants caused through the negligence of any employé does not tend to impair its validity. *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942, 950.

Under the decisions on the Safety Appliance Acts, if any car in a train is being used in interstate commerce, all cars in that train must be equipped according to the provisions of the acts, whether such cars are being used or were ever used in carrying interstate merchandise. See *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1; *Schlemmer v. Buffalo &c. Ry. Co.*, 205 U. S. 1; *Wabash*

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Railway Company v. United States, and *Elgin J. & E. Ry. Co. v. United States*, 168 Fed. Rep. 1.

Congress has power to impose liability upon an interstate carrier by railroad in favor of an interstate servant injured through the negligence of other employ  s working at and about and in connection with such interstate railroad, irrespective of the employment of the servant chargeable with careless acts resulting in such injury. *Gilman v. Philadelphia*, 3 Wall. 713; *In re Debs*, 158 U. S. 564.

The act in question is not invalid because confined to common carriers by railroad engaged in interstate commerce, nor because it embraces all interstate employ  s on interstate roads, when injured while engaged in such service, without regard to the character of such service. *Patterson v. Bark Eudora*, 190 U. S. 169; *Kiley v. Chicago, Milwaukee & St. Paul Ry. Co.*, 138 Wisconsin, 215.

Sections 3 and 4 of the act, the first establishing the doctrine of comparative negligence, the second abrogating the doctrine of assumption or risk in certain cases are valid enactments. *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1; *Schlemmer v. Buffalo &c. Ry. Co.*, 205 U. S. 1.

It was the aim of Congress to do exact justice. As to wisdom of such a rule as applied to marine torts, see *The Max Morris*, 137 U. S. 1; *The Mystic*, 44 Fed. Rep. 399. Whether or not these provisions are equitable or unjust is a matter concerning Congress and not the courts. *St. Louis & Iron Mountain Ry. Co. v. Taylor*, 210 U. S. 281, 295.

Section 5, limiting the right of contract and providing that no rule, etc., shall be permitted to exempt such common carriers from any liability created by said act,

is a valid enactment. *Kiley v. Chicago, M. & St. P. Ry. Co.*, 138 Wisconsin, 215.

Sections 3, 4 and 5 are clearly separable from the main body of the statute and, even if one or all should be held invalid, nevertheless, the main statute could and should be sustained, notwithstanding such invalidity.

The statute is in keeping with modern thought and is a wise and humane enactment. Many States have legislated along similar lines and probably in no State does the common law still exist in its full force and effect. All men, including all persons engaged in the business of transportation, now concede that the general object sought by the enactment of the statute is one that should meet with universal approval.

The Attorney General, by leave of the court, filed a brief for the United States, as *amicus curiæ*, in No. 170: ¹

So far as it relates to the liability of an interstate employer to an interstate employé for injury received through the negligence of another interstate employé, the act is a regulation of interstate commerce, and within the constitutional power of Congress.

In the *Employers' Liability Cases*, 207 U. S. 463, the enactment there considered was held unconstitutional, for the reason that it imposed a liability to an intrastate employé as well as to an interstate employé; while what was then said in the opinion of the court concerning the authority of Congress to regulate the liability to an in-

¹ The brief contained the following statement:

The foregoing brief was prepared by the late Solicitor General (Lloyd W. Bowers who died in September, 1910) with his accustomed care and ability. In order that it may properly be before the court, I adopt it and ask its consideration. Geo. W. Wickersham, Attorney General. December, 1910.

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terstate employé was not logically vital to the decision, nevertheless the utterance was made after full discussion of the very question at the bar, after solemn consideration of the question by the court, and in a deliberate purpose of preventing misconception by Congress of the actual and limited scope of the exact decision, with the result that Congress should not mistakenly believe itself incapable of enacting a new statute affecting interstate employés alone.

Whether the court's declaration was, in a technical view, dictum or decision, the declaration certainly was not casual or unconsidered, but was solemnly made after argument, upon consideration, and with serious, just and beneficent purpose, and see dissenting opinions of Justices HARLAN, McKENNA, HOLMES and MOODY.

In the later case of *Adair v. United States*, 208 U. S. 161, this court treated the power of Congress as settled.

Congress passed the act of 1908 in the purpose of exercising a power which this court, in *The Employers' Liability Cases* and in the *Adair Case*, solemnly accorded to Congress; and the lower Federal courts have regarded those cases as settling the matter. *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942; *Zikos v. Oregon R. R. & Nav. Co.*, 179 Fed. Rep. 893.

Whatever may be the power of Congress to legislate about or for agents of interstate commerce, when such legislation can have no substantial influence upon the act which is interstate commerce, there can be no doubt of the congressional authority to legislate concerning the agents of interstate commerce in ways that do substantially influence the act of interstate commerce about which such agents are engaged, or affect the reliability, security, promptness or economy of the Interstate Com-

merce Act. Interstate commerce—if not always at any rate when the commerce is transportation—is an act.

If Congress regards the rule of employer's responsibility established by this new statute as more conducive than the old rule to the security of the men performing the act of interstate commerce, whether it is right in its conclusion is unimportant, for, if that view can be fairly entertained, it is not for the courts to substitute their opinion concerning the better policy. *Employers' Liability Cases, supra; St. Louis & I. M. Ry. Co. v. Taylor*, 210 U. S. 281.

Testing the rule therefore by the theory on which it may and does rest, it is an enactment to promote not only the actual, but also the prompter, cheaper, safer and more efficient, performance of the act of interstate commerce itself. Illustrations of the power of Congress to regulate the act of interstate commerce by legislation concerning the agents who do it or the instruments with which it is done exist both in the Federal statutes and in the decisions of this court.

Congress may create an agent for doing interstate commerce, *Pacific Railroad Removal Cases*, 115 U. S. 1; *California v. Pacific Railroad*, 127 U. S. 1; may authorize the erection of bridges as instrumentalities of interstate commerce, *The Clinton Bridge*, 10 Wall. 454; *Luxton v. North River Bridge Co.*, 153 U. S. 525; may prescribe the character or qualifications of the agents of interstate commerce—so as to pilots. See *Sprague v. Thompson*, 118 U. S. 90, 95.

Such power as the States possess to license and to require the use of pilots exists only because Congress leaves them that power until action by itself. *Cooley v. Philadelphia Wardens*, 12 How. 299; *Huus v. N. Y. &*

Porto Rico S. S. Co., 182 U. S. 392; *Olsen v. Smith*, 195 U. S. 332, 344.

Congress may prescribe the kind and condition of the material instruments with which commerce shall be done. See Safety Appliance Acts, March 2, 1893, 27 Stat. 531; of April 1, 1896, 29 Stat. 85; March 2, 1903, 32 Stat. 943; and numerous acts concerning such things as steam boilers, life preservers, lifeboats and fire apparatus on vessels.

The validity of the Safety Appliance Acts seems never to have been questioned either by the bar or by this court. *Johnson v. Southern Pacific Co.*, 196 U. S. 1; *Schlemmer v. B., R. & P. Ry. Co.*, 205 U. S. 1; *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281.

The system of licensing steam vessels engaged in interstate commerce was upheld in *The Daniel Ball*, 10 Wall. 557.

The supply and distribution of cars as instruments of interstate commerce may be regulated under the authority of Congress. *Int. Com. Comm. v. Ill. Cent. R. R. Co.*, 215 U. S. 452, 474. For other instances see Hours of Service Act, March 4, 1907, 34 Stat. 1415; Explosive Act of July 3, 1866, 14 Stat. 81; Rev. Stat., §§ 5353-5355, Commodities Clause; *United States v. Del. & Hudson Co.*, 213 U. S. 366.

Congress may legislate in reasonable ways to preserve the existence and conserve the efficiency of interstate employes against other persons who are in the same interstate business. The Federal power is to protect and advance the act of interstate commerce, and so to protect and further the work of any particular agent of interstate commerce, against all the world. *In re Debs*, 158 U. S. 564. Even a State of the Union cannot

sanction an interruption. *Gibbons v. Ogden*, 9 Wheat. 1; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; *Union Bridge Co. v. United States*, 204 U. S. 364.

Congress would probably be within its power if it were legislating solely for the benefit of the interstate employé who is injured in interstate work, and without reference to the effect of its legislation upon the security and efficiency of the interstate act itself.

In *Patterson v. Bark Eudora*, 190 U. S. 169, the commerce clause was held to empower Congress to forbid the advance payments of wages to seamen engaged in interstate or foreign commerce. This rule was enacted for the sole benefit of the seamen as the agents of commerce. The case did not rest upon the admiralty powers of the United States.

Congress may so legislate as to preserve the utility or the beneficence of commerce to those for whom it is done or to the public at large, and may prevent the conduct of pernicious commerce. *Lottery Case*, 188 U. S. 321; *United States v. Del. & Hudson Co.*, 213 U. S. 366.

The statute is a regulation of interstate commerce although it creates a liability of the interstate employer to his interstate employé for injury of the latter through the negligence of an intrastate employé. *Schlemmer v. Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 11.

Abolition of the fellow-servant rule is only an extinction in the particular case of the doctrine of assumed risk.

The constitutional function of Congress is to save and promote interstate commerce; and it may save and promote it through suppression of any kind of injurious influence. *In re Debs*, 158 U. S. 564; *Loewe v. Lawlor*, 208 U. S. 274.

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Congress has forbidden local bridges which interfere with interstate navigation; local carriage of explosives on interstate trains; state or municipal interference with the business of interstate soliciting agents, and state and municipal taxation of interstate business. An act for punishment of outsiders for stealing goods of a wrecked vessel was upheld, under the commerce clause, in *United States v. Coombs*, 12 Pet. 72, 77.

An interstate employer can be required to be careful about the apparatus that he uses, for the protection of his employé who is engaged in interstate work, without reference to the interstate or intrastate character of the use to which the apparatus is being put at the particular time.

If constitutional difficulty be found about extending the interstate employer's responsibility to an interstate employé for negligence of an intrastate employé, the statute then should be construed as limited to the case of an interstate employé's negligence.

The proper construction of the statute, unless that construction will destroy it, includes the case of an intrastate employé's negligence.

The congressional selection of a civil liability of the interstate employer as the best sanction for his new duty of preventing injury of an interstate employé through negligence of his coemployés is clearly allowable; and, as Congress had authority to adopt that sanction, it necessarily prescribed to whom the new civil right should belong. See TAFT, Cir. J., in *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. Rep. 298, 300.

A new civil duty necessarily involves a new civil right. It was allowable, because unavoidable, for Congress to say who should have the right of civil recovery. Other-

wise, even if it would be competent for the States to designate the possessor or beneficiary of the right, the state legislatures might make no such designation. In any event, the effectiveness of the congressional rule of duty would be left to the choice of the States.

The statutory provisions that the injured man may sue and that, if he dies, his personal representative may sue for the benefit of designated relatives, are requisite to the existence of any effective right, and therefore of any effective duty.

The designation of the beneficiaries of the new right, in case the injured employé dies, does not interfere with the ordinary control of the States over *post mortem* succession. State laws of descent have nothing to do with the question who may continue settlement and finally take title under the homestead law of the United States, after death of the original entryman. *Bernier v. Bernier*, 147 U. S. 242; *McCune v. Essig*, 199 U. S. 382.

Congress can enact that the responsibility of an interstate employer to an interstate employé for negligence of coemployés or negligence about appliances shall not be entirely displaced by contributing negligence of the interstate employé.

Nobody has a vested right in the continuance of the rules of the common law. Rights already created under those rules and property already derived from them have sanctity; but the common law may be changed as to future transactions, just as statutes may be. *Munn v. Illinois*, 94 U. S. 113, 134.

How the interstate employé's negligence shall be allowed to affect the interstate employer's liability for his own negligence or for negligence with which he is chargeable is purely one of policy, within the legis-

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tive discretion, and the common-law view may rationally be rejected. The alternative conclusion which Congress has reached is to be found in the long established rules of certain jurisdictions not holding to the common law and in the recent trend of English and American legislation. See, for instance, the admiralty practice, which divides the loss between persons concurrently negligent. *The Sapphire*, 18 Wall. 51, 56; *The Max Morris*, 137 U. S. 1. And contribution lies between joint tort feorsors in admiralty. *Erie R. R. Co. v. Erie Transp. Co.*, 204 U. S. 220, 225, 227.

The rule of comparative negligence, variant in its details but always contradictory of the common-law rule, was established by the courts in Illinois, Kansas and Tennessee. *Galena v. Jacobs*, 20 Illinois, 478, 496; *Chicago v. Stearns*, 105 Illinois, 554; *Union Pacific R. Co. v. Rollins*, 5 Kansas, 167, 180; *Kansas &c. R. Co. v. Peavey*, 29 Kansas, 169, 180; *Nashville &c. R. Co. v. Smith*, 6 Heisk. 174; *Nashville &c. R. R. Co. v. Carroll*, 6 Heisk. 347, 366.

For statutory instances, see Georgia Code, § 2972; Florida Laws of 1887, c. 3744, § 1; Mississippi Code of 1892, § 3548; English Employers' Liability Acts, Aug. 6, 1897; 60 and 61 Vict., c. 37, § 1; Act of July 30, 1900, 63 and 64 Vict., c. 22; *McNicholas v. Dawson*, 68 L. J. (Q. B.) 470.

It seems never to have been held anywhere that the Federal or any state constitution requires that contributory negligence be either total or a partial defense.

As to statutes adopting the rule of comparative negligence and abolishing contributory negligence, see *Nor. Pac. Ry. Co. v. Castle*, 172 Fed. Rep. 841, 843; *Alabama G. S. Ry. Co. v. Coggings*, 88 Fed. Rep. 455; *Chris-*

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tian v. Macon Ry. & Light Co., 120 Georgia, 314; *Railroad Co. v. Foxworth*, 41 Florida, 1, 63; *Phila., B. & W. R. R. Co. v. Tucker*, 35 App. D. C. 123; 38 Washington Law Reporter, 230; *Pulliam v. Illinois Central R. R. Co.*, 75 Mississippi, 627; *Schlemmer v. Buffalo &c. Ry. Co.*, 205 U. S. 1.

Congress likewise can modify, as it did in § 4, as to interstate employes the assumption of risk rule in cases where the common carrier has violated any statute enacted for the safety of employes and so contributed to the injury or death of such employe.

Recent statutory abrogation of the doctrine of assumption of risk will be found in North Carolina Act of February 23, 1897, Private Laws of 1897, c. 56; Massachusetts Laws of 1895, c. 362, § 7; New York Act of April 15, 1902, Laws of 1902, Vol. 2, c. 600, § 3, pp. 1748-50; English Employers' Liability Act of 1880, as interpreted in *Thomas v. Quartermaine*, 18 Q. B. D. 685, and *Smith v. Baker*, App. Cas. 1891, 325; English Employers' Liability Act of July 30, 1900, 63 and 64 Vict., c. 22; Federal Safety Appliance Act of March 2, 1893, as amended April 1, 1896, § 8 (27 Stat. 531, and 29 Stat. 85).

For judicial authorities upholding general statutory changes of that nature, see *Coley v. Railroad Co.*, 128 Nor. Car. 534; s. c., 129 Nor. Car. 407; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; *Miss. & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210; *Chicago, K. & Western R. R. Co. v. Pontius*, 157 U. S. 209; *Tullis v. Lake Erie & West. R. R. Co.*, 175 U. S. 348; *Minnesota Iron Co. v. Kline*, 199 U. S. 593; *Narramore v. Cleveland &c. R. R. Co.*, 96 Fed. Rep. 298, 302; *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vermont, 288; *Schlemmer v.*

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Buff., Roch. & Pitts. Ry. Co., 205 U. S. 1, 11-14; *Johnson v. Southern Pacific Co.*, 196 U. S. 1.

Sections 3 and 4, concerning contributory negligence and assumption of risk, are each clearly separable from the rest of the statute; and even if they are unconstitutional that would not affect the operation of the rest of the act. *El Paso &c. Ry. Co. v. Gutierrez*, 215 U. S. 87.

Congress did not attempt, either in the act of 1908 or that of April 5, 1910, to confer a new jurisdiction upon state courts over actions in enforcement of the new Federal right; and, even if the act of April 5, 1910, should be construed as embracing such an attempt, its invalidity in that respect would not affect the substantive rules of law established by the act of 1908. Nor can Congress be considered to have made the operation of the substantive rules of law established by the act of 1908 dependent upon the willingness of all or any state courts to take cognizance of actions founded upon those rules. *Hoxie v. N. Y., N. H. & H. R. R. Co.*, 73 Atl. Rep. 754, 762, is clearly wrong.

The act of 1908 did not try to give a new jurisdiction of its own creation to the state courts. The act deals entirely with rights and duties—not with remedies. It creates rules of substantive law.

The state courts, inasmuch as Congress did not give exclusive jurisdiction to the Federal courts, could and should use their general jurisdiction, given to them by their state legislatures, in enforcement of the Federal right. The privilege of the state courts so to use their jurisdiction is undeniable, when neither Congress nor the state legislature has withdrawn that privilege in a particular case. The general grant of jurisdiction by state law is sufficient to cover any right, whether created

by the law of that State or of other States or of the United States or of foreign countries. Congress has left the state courts free to use that general jurisdiction, by not prohibiting its use; and the terms of the State's grant of jurisdiction cover the case. *Clafin v. Houseman*, 93 U. S. 130.

It is the duty, as well as the right, of the state courts to take jurisdiction of actions under the Federal Employers' Liability Act. Report of the Senate Committee on the Judiciary, March 22, 1910, 61st Congress, 2d Session.

The statute makes no reference to remedies, and establishes the law independently of remedies. The clause of 1910 about concurrent jurisdiction of the state courts was obviously intended to prevent a mistaken and important reduction of remedies—not to make new conditions upon the operation of the original statute.

Further, the attitude of the state courts can make no real difference in the operation of the statute. In the first place, any claimant of the new Federal right can go into a Federal court by simply laying his damages at more than \$2,000. In the second place, as already suggested, this court can doubtless compel the state courts to exercise in aid of the new Federal right such jurisdiction as those courts have under state laws.

The act does not deprive a railroad of its property without due process of law, in violation of the Fifth Amendment.

Assuming that the due process requirement of the Fifth Amendment is equivalent to the equal protection of the laws required by the Fourteenth Amendment, the authorities show that this court has already repeatedly disposed of these objections to the act.

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The following cases sustain state statutes abolishing the fellow-servant rule upon railroads alone, against express attack under the Fourteenth Amendment: *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; *Minn. & St. Louis R. R. Co. v. Herrick*, 127 U. S. 210; *Chicago &c. R. R. Co. v. Pontius*, 157 U. S. 209; *Tullis v. Lake Erie & Northern R. R. Co.*, 175 U. S. 348; *St. Louis Bridge R. R. Co. v. Callahan*, 194 U. S. 628; *Minnesota Iron Co. v. Kline*, 199 U. S. 593; *P., C., C. & St. L. R. R. Co. v. Lightheiser*, 212 U. S. 560; *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36.

Pertinent support of other legislation making special rules for railroads is found in *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284; *St. Louis, I. M. & S. Ry. Co. v. Paul*, 173 U. S. 404; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 417.

Extension of the new rules to interstate employ  s generally was permissible. Their restriction to employ  s injured in consequence of special railroad hazard was not required by the Constitution.

Of the cases above cited, concerning statutes abolishing the fellow-servant rule upon railroads, the following related to injuries which did not result from any peculiar hazard: *Chicago &c. R. R. Co. v. Pontius*, 157 U. S. 209; *St. Louis &c. Terminal R. R. Co. v. Callahan*, 194 U. S. 628 (see the full facts in s. c., 170 Missouri, 473); *Minnesota Iron Co. v. Kline*, 199 U. S. 593; *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36.

El Paso & Northeastern Ry. Co. v. Gutierrez, 215 U. S. 87, while not explicitly treating it, really covers the exact point as presented under this legislation.

The cases at bar involve no question under    5 concerning the validity of a contract exempting the carrier

from responsibility under the rules of the statute. That section is manifestly separable from the rest of the act. Strong principle and much authority support its validity; but its palpable separableness makes discussion of the section now unnecessary. *McNamara v. Washington Terminal Co.*, 38 Wash. Law Rep. 343, in which § 5 of the present act was construed and upheld. The separableness of § 5 is too plain for discussion.

Mr. John L. Hall for plaintiff in error in No. 289 and defendant in error in No. 290:

The act is not in itself a regulation of commerce. *Gibbons v. Ogden*, 9 Wheat. 196.

The Constitution which enumerates the powers of the National Government is in itself a limitation upon the power of Congress to legislate. *United States v. Knight*, 156 U. S. 1, 11.

The Constitution guarantees the existence of the powers of the state governments no less than it guarantees the powers of the Federal Government. *Cooley on Const. Lim.* 592; *Ward v. Maryland*, 12 Wall. 418. This act is not one which plainly, logically, and directly tends to promote commerce between the States. *Hopkins v. United States*, 171 U. S. 592.

In cases in which this court has described the power of the States to legislate upon interstate commerce, the legislation which has been under consideration has always directly and logically affected the intercourse between the States, see *Hall v. DeCuir*, 95 U. S. 485; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Brown v. Maryland*, 4 Wash. C. C. 378; *Gibbons v. Ogden*, 9 Wheat. 1; *Crandall v. Nevada*, 6 Wall. 35; *Wabash R. R. v. Illinois*, 118 U. S. 557; *Nashville &c.*

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R. R. v. Alabama, 128 U. S. 96; *Osborne v. Florida*, 164 U. S. 650; *Pullman Co. v. Adams*, 189 U. S. 420; *Gladson v. Minnesota*, 166 U. S. 427; *Illinois Central R. R. v. Illinois*, 163 U. S. 142.

The cases of *Coe v. Errol*, 116 U. S. 517; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *N. Y., N. H. & H. R. R. v. New York*, 165 U. S. 628; *Louisville &c. Ry. Co. v. Mississippi*, 133 U. S. 587; *Hennington v. Georgia*, 163 U. S. 299; *Telegraph Co. v. James*, 162 U. S. 650; *Nashville &c. Ry. v. Alabama*, 128 U. S. 96, involve the consideration of statutes which bear directly and naturally upon the commerce itself.

Any regulation to come within the meaning of the interstate commerce clause must be direct and logical and not indirect, remote and merely incidental. *Addyston P. & S. Co. v. United States*, 175 U. S. 211; *Hooper v. California*, 155 U. S. 648; *Munn v. Illinois*, 94 U. S. 113; *L. & N. Ry. v. Kentucky*, 161 U. S. 677; *Lake Shore Ry. v. Smith*, 173 U. S. 684.

The act does not declare that it regulates interstate commerce. It prescribes no rule by which commerce is to be governed; it determines no conditions upon which it shall be conducted. It does not seek to secure equality and freedom against discrimination. It does not determine when it shall be free or when it shall be subject to any duties or other burdens. See Minority Report on the redraft of this bill known as H. R. No. 2310 of the 60th Congress, 1st Session and Report No. 1386, H. R., 60th Congress, 1st Session.

Cases arising under maritime law in which acts of Congress upon the relations of owners of ships to the owners of goods, upon the relations with passengers and employ  s, have been sustained, rest not on the com-

merce clause but on the admiralty jurisdiction. *Craig v. Insurance Company*, 141 U. S. 638; *Butler v. Boston S. S. Co.*, 130 U. S. 548; and see *B. & O. R. R. v. Maryland*, 21 Wall. 456; *In re Garnett et al.*, 141 U. S. 1; *The Daniel Ball*, 10 Wall. 557; *The Roanoke*, 189 U. S. 185; *The Lottawanna*, 21 Wall. 558.

Acts which are held constitutional when applied to maritime regulation are not necessarily constitutional when applied to commerce by land.

The Safety Appliance Acts are justified because it was essential that States should not legislate as to the instrumentalities which should be used by railroads. Such legislation by States would interfere with interstate commerce and place a burden upon free and rapid transportation. The legislation was national in its character and required uniformity of regulation. *United States v. Southern Ry. Co.*, 164 Fed. Rep. 351.

This act invades the sovereignty of the States. *Trade Mark Cases*, 100 U. S. 96; *Barbier v. Connolly*, 113 U. S. 27; *Hooper v. California*, 155 U. S. 648.

If Congress has the power to determine the liability of a railroad company to its employes simply because both are engaged in interstate commerce, then it has the same right to regulate the liability of a shipper to its employé when engaged in interstate commerce. In fact, there is scarcely any relation upon which it cannot legislate. The States would be shorn of their power to regulate their domestic affairs. *Houston v. Moore*, 5 Wheat. 1, 48; *Keller v. United States*, 213 U. S. 138; *Leisy v. Hardin*, 135 U. S. 100; *Pa. R. R. v. Knight*, 192 U. S. 21; *Chicago &c. R. R. v. Solan*, 169 U. S. 133; *United States v. E. C. Knight Co.*, 156 U. S. 1; *Northern*

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Securities Co. v. United States, 193 U. S. 197; *L. & N. R. R. v. Kentucky*, 161 U. S. 677.

The act regulates the relation of master and servant as to things which are not exclusively interstate commerce.

It substantially reenacts in this particular the words of the previous Employers' Liability Act, and must be presumed to have been drafted with knowledge of the judicial construction which those words had received. *Employers' Liability Cases*, 207 U. S. 463.

An interstate carrier is also an intrastate carrier and employes upon the same train may be engaged at the same time in interstate and intrastate commerce; the statute therefore confers a right of recovery upon employes engaged in intrastate commerce, and thus touches the relation of master and servant as to matters concerned with intrastate commerce.

The right of the State to regulate its commerce within its own borders is paramount to the power of Congress to regulate such commerce. *The License Cases*, 5 How. 504.

The act touches directly and seeks to regulate the relation of master and servant as to intrastate business. *Hoxie v. N. Y., N. H. & H. R. R. Co.*, 82 Connecticut, 352, 368.

When Congress seeks to impose some new rule of liability upon employers engaged in interstate commerce it is imposing a rule of liability to the same extent in effect upon those who are engaged in intrastate commerce. It denies the authority of the State to regulate its domestic commerce, which is in no respect inferior to the power of Congress to regulate interstate commerce. *Zikos v. Oregon R. & N. Co.*, 179 Fed. Rep. 893.

The act is unconstitutional in that it violates the Fifth Amendment to the Constitution, which is a limitation upon the power of Congress, while the Fourteenth is a limitation upon the power of the States. The purpose of both amendments is to secure the existence of fundamental justice and to prevent capricious and arbitrary legislation whereby unfair burdens are placed upon one class of persons.

The construction placed upon one Amendment is applicable to the other. *San Mateo County v. So. Pac. Ry.*, 13 Fed. Rep. 151; *Dent v. West Virginia*, 129 U. S. 114; *Sinking Fund Cases*, 99 U. S. 718; *French v. Barber Asphalt Co.*, 181 U. S. 324; *Munn v. Illinois*, 94 U. S. 123; *Giozza v. Tiernan*, 148 U. S. 657; *Hurtado v. California*, 110 U. S. 516; *Gulf, Colorado &c. R. R. v. Ellis*, 165 U. S. 150.

The act violates the Fifth Amendment because: It imposes upon common carriers by rail engaged in interstate commerce liabilities which are not imposed upon others engaged in interstate commerce; it deprives common carriers by rail engaged in interstate commerce of defenses which are available to others engaged in interstate commerce; it limits the powers of contract of common carriers by rail engaged in interstate commerce in their relations with their employes, and does not limit such powers of others engaged in interstate commerce.

Congress sought no reasonable or proper basis for the classification, although its attention was directed to the necessity for such a distinction. See Cong. Rec. 1908, 4433. Congress is not seeking to regulate interstate commerce by regulating the hazardous business of operating a railroad, but is attempting to regulate

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carriers by rail in all of their departments, and liability is imposed in favor of all employés while engaged in interstate commerce.

The Fifth Amendment insures equal protection of the laws. It prevents distinctions and classifications, unless the classifications are made upon some basis which is natural and not arbitrary. *Gulf, Colorado &c. R. R. v. Ellis*, 165 U. S. 150; *Missouri Pacific Ry. v. Mackey*, 127 U. S. 205; *Minneapolis &c. Ry. v. Herrick*, 127 U. S. 210; *Chicago &c. R. R. v. Pontius*, 157 U. S. 209.

As a basis for classification by special legislation of Congress, this court has no right to assume that the majority of the members of the class who are favored by this legislation are exposing their lives to extraordinary risks when the facts are to the contrary. This court will determine for itself the propriety of the classification. *Lochner v. New York*, 198 U. S. 45.

It is for this court to assume that those actually engaged in the movement and operation of trains form a greater part or even one-half of the total number of employés engaged in the business of interstate commerce of any carrier by rail so engaged.

A classification is not justified by general considerations when the reason for the classification applies to less than one-fifth of the class selected. *Accident Insurance Manual*, 365-371; 21st Report Interstate Com. Comm. 153; and see *Louisville & Nashville Ry. v. Melton*, 218 U. S. 36; *Tullis v. Lake Erie & W. R. R.*, 175 U. S. 348; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 294; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Minnesota Iron Co. v. Kline*, 199 U. S. 593; *Martin v. Pittsburg &c. R. R.*, 203 U. S. 284; *Southwestern Oil*

Co. v. Texas, 217 U. S. 114; *Johnson v. Ry. Co.*, 43 Minnesota, 222, as to classifications, holding that one rule of liability cannot be established for railway companies merely as such and another rule for other employers under like circumstances, and that special legislation to be not class legislation must not only treat alike under the same conditions all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions.

The act has not included within its provisions the interstate employés of all other persons engaged in interstate commerce.

It includes within its terms only one class of employers who are engaged in interstate commerce; namely, railroads. It discriminates against railroad companies engaged in interstate commerce who operate and maintain boats, wharves, docks and incidental equipment, and other employers engaged in interstate commerce operating and maintaining boats, wharves, and incidental equipment under precisely the same conditions.

The provisions of § 5 violate the Fifth Amendment in that they interfere with freedom of contract. *Adair v. United States*, *supra*.

The right of contract is as well recognized as the right to property. *Allgeyer v. Louisiana*, 165 U. S. 578; *Railroad Co. v. Richmond*, 19 Wall. 584; *Hoxie v. N. Y., N. H. & H. R. R. Co.*, 82 Connecticut, 352, 369.

If the act is constitutional, plaintiff in this case cannot recover as the employé must be engaged in interstate commerce at the time of his injury in order to maintain his action under the statute, and the burden is necessarily upon the plaintiff to show that at the time

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of the injury he was not engaged in intrastate commerce.

The work performed by some employés may be properly described as dangerous, while the work performed by other employés is subject to no more risks than the ordinary occupations of life. There are employés engaged in the direct movement and operation of trains; employés engaged in the repair and maintenance of tracks; those engaged in the construction and repair of locomotives and cars; those whose duties are purely commercial and clerical. See on this point *Foley v. Railroad*, 64 Iowa, 644; *Stroble v. Railroad*, 70 Iowa, 555; *Malone v. Railroad*, 65 Iowa, 417; *Johnson v. Railroad*, 43 Minnesota, 222; *Jemming v. Railroad*, 96 Minnesota, 302; *Missouri, K. & T. R. R. v. Medaris*, 60 Kansas, 151; *Indianapolis & G. R. R. v. Foreman*, 162 Indiana, 85; *Taylor v. Southern Railway*, 178 Fed. Rep. 380; *St. Louis & St. F. R. R. v. Delk*, 158 Fed. Rep. 931.

The car involved in this case bore the same relation to interstate commerce that it would have borne had it been in the repair shop awaiting repairs, and under those circumstances the men engaged in repairing the car would not have been engaged in interstate commerce or any other commerce.

The carrier is not liable for the negligence of an intrastate employé. *Zikos v. Oregon Railroad & Navigation Co.*, 179 Fed. Rep. 893.

The act seeks to regulate the relations of the employer to the members of the family of a deceased employé, which Congress cannot do under its power to regulate commerce.

In this respect the act invades the settled limits of the

sovereignty of the States, *Williams v. Fears*, 179 U. S. 270, and also seeks to determine the administration of the estates of deceased persons. Congress has not the power to create the duties of an administrator. The power of the administrator is limited by the authority granted him by the State which created his office.

A strict construction of this statute, which alters the common law, is required, and no sufficient provision has been made for the assessment of damages. *Sewall v. Jones*, 26 Massachusetts, 9 Pick. 412; *United States v. Fisher*, 2 Cranch, 358; *Shaw v. Railroad Co.*, 101 U. S. 557.

Mr. Endicott P. Saltonstall, with whom *Mr. George D. Burrage* was on the brief, for plaintiff in error in No. 290, and defendant in error in No. 289:

The Employers' Liability Act of 1906 was declared unconstitutional because it was addressed to all common carriers engaged in interstate commerce, and imposed a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes might be engaged at the time of the injury. *Employers' Liability Cases*, 207 U. S. 498.

Immediately thereafter Congress enacted the act of April 22, 1908, and met the objections to the former act. See report of House Committee on the Judiciary on House Bill 20310; *Thornton's Employers' Liability*, 247-260. The act has been passed on and upheld in *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. Rep. 942; *Colasurdo v. Central R. R. of N. J.*, 180 Fed. Rep. 832; *Zikos v. Oregon R. & N. Co.*, 179 Fed. Rep. 893; *Fulgham v. Midland Valley R. Co.*, 167 Fed. Rep. 660;

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Winfree v. Northern Pac. Ry. Co., 173 Fed. Rep. 65; *Dewberry v. Southern Ry. Co.*, 175 Fed. Rep. 307; *Bottoms v. St. Louis & S. F. R. Co.*, 179 Fed. Rep. 318, and held unconstitutional only in *Hoxie v. N. Y., N. H. & H. R. R. Co.*, 82 Connecticut, 354, and *Mondou v. Same*, 82 Connecticut, 373.

Congress has power to regulate the relations of master and servant as between an interstate carrier and an interstate employé. *State v. Chicago, M. & St. Paul R. Co.*, 136 Wisconsin, 407, at 410.

Congress has power, in regulating the relations of master and servant, as aforesaid, to make an interstate carrier liable to an interstate employé for the negligence of an intrastate employé. *Watson v. St. Louis &c. Ry. Co.*, *supra*; *United States v. Col. & N. W. R. R. Co.*, 157 Fed. Rep. 321; *The Daniel Ball*, 10 Wall. 557, 566; *In re Debs*, 158 U. S. 564, 599; *United States v. Burlington &c. Ferry Co.*, 21 Fed. Rep. 331, 340; *The Hazel Kirke*, 25 Fed. Rep. 601, 607.

If the act is constitutional, but applies only where the negligent fellow servant is engaged in interstate commerce, the road is liable, as there was evidence that the negligence which caused the accident was that of interstate employés.

The provisions of the act in this respect are separable, and liability may be upheld where the injury is caused by an interstate employé, although denied where caused by an intrastate employé. *Zikos v. Oregon R. & N. Co.*, *supra*.

The act does not violate either the Fifth or the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Mackeys*, 127 U. S. 205; *Minneapolis &c. Ry. Co. v. Herrick*, 127 U. S. 210; *Chicago &c. R. R. v. Pontius*, 157 U. S. 209;

Louisville & Nashville R. R. Co. v. Melton, 218 U. S. 36; *Tullis v. Lake Erie & W. R. R. Co.*, 175 U. S. 348; *Pittsburg &c. Ry. Co. v. Ross*, 212 U. S. 560.

Congress has power to provide a remedy to an injured employé of an interstate carrier as provided in § 3 of the act. *The Max Morris*, 137 U. S. 1, 14; *Johnson v. Southern Pacific Co.*, 196 U. S. 1; *Schlemmer v. Buffalo &c. Ry. Co.*, 205 U. S. 1.

The common-law rule that contributory negligence is a bar to recovery may be altered or abolished by the legislature whenever, in its discretion, it sees fit to do so. *Munn v. Illinois*, 94 U. S. 113, 134; *Hurtado v. People of California*, 110 U. S. 516; see also *Wilmington Mining Co. v. Fulton*, 205 U. S. 60, 74; *Bertholf v. O'Reilly*, 74 N. Y. 509, 524.

A legislature may by statute extend the common-law liability of a railroad, *Chicago &c. Ry. Co. v. Zerneck*, 183 U. S. 582; *St. Louis &c. Ry. Co. v. Taylor*, 210 U. S. 281; or limit it, *Martin v. Pittsburg &c. R. R.*, 203 U. S. 284.

The act is not invalid as violating the constitution and statutes of Connecticut, because it has been held unconstitutional in that State. *Nashville &c. Ry. Co. v. Alabama*, 128 U. S. 96, 99.

It is not necessary that an act of this nature should make any provision for the assessment of damages. If it makes none, the jury will be instructed as to the manner of assessing damages, and these instructions will be based upon the principles of the common law governing actions of tort for personal injury.

The Safety Appliance Act is a penal statute, and there are no words specifically giving an injured employé a right of action for damages, much less providing how

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those damages shall be assessed. *Johnson v. Southern Pac. Co.*, *supra*; *Schlemmer v. Buffalo &c. Ry. Co.*, *supra*.

Congress can create such a right of action in favor of personal representatives of an inhabitant of a State.

Congress may, within constitutional limits, alter or modify the common law. A state statute as to distribution of estates can stand on no higher ground. *Sherlock v. Alling*, 93 U. S. 99, 104.

Congress has power to abolish the doctrine of assumption of risk, as provided in § 4 of the act. *Johnson v. Southern Pac. Co.*; *Schlemmer v. Buffalo &c. R. Co.*, *supra*.

Congress has power to declare void a contract which enables a common carrier to exempt itself from liability under the act, as provided in § 5.

The company and the deceased were engaged in interstate commerce at the time of the accident.

The car which was backed or "kicked" down upon the car under which Walsh was working was a car belonging to the company, coupled to an Erie flat car.

The single fact that the car which deceased undertook to repair contained perishable freight brought from outside the State where the accident happened is sufficient to show that the company was engaged in interstate commerce at the time. *The Daniel Ball*, *supra*; *Wabash &c. Ry. Co. v. Illinois*, 118 U. S. 557; *Norfolk &c. Ry. Co. v. Pennsylvania*, 136 U. S. 114; *United States v. Col. & Northwestern Ry. Co.*, *supra*; and see also *United States v. Chicago &c. Ry. Co.*, 149 Fed. Rep. 486, 490; *United States v. St. Louis &c. R. Co.*, 154 Fed. Rep. 516; *United States v. Illinois Cent. R. R.*, 156 Fed. Rep. 182, 193; *United States v. Wheeling &c. R. R. Co.*, 167 Fed. Rep. 198; *Wabash R. Co. v. United States*, 168 Fed. Rep. 1;

Belt Ry. Co. v. United States, 168 Fed. Rep. 542; *Chicago Junc. Ry. Co. v. King*, 169 Fed. Rep. 372; *United States v. Southern Ry. Co.*, 170 Fed. Rep. 1014; *Johnson v. Great Northern Ry. Co.*, 178 Fed. Rep. 643, 646; *Felt v. Denver &c. R. Co.*, 110 Pac. Rep. 215.

MR. JUSTICE VAN DEVANTER, after stating the cases as above, delivered the opinion of the court.

The principal questions presented in these cases as discussed at the bar and in the briefs are: 1. May Congress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employes while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? 3. Do those regulations supersede the laws of the States in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion?

The clauses in the Constitution (Article I, § 8, clauses 3 and 18) which confer upon Congress the power "to regulate commerce * * * among the several States" and "to make all laws which shall be necessary and proper" for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial

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intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

3. "To regulate," in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any-wise engaged in such transportation, whether as common carriers or as their employés.

6. The duties of common carriers in respect of the safety of their employés, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both

are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. *Cooley v. Board of Wardens*, 12 How, 299, 315-317; *The Lottawanna*, 21 Wall. 558, 577; *Sherlock v. Alling*, 93 U. S. 99, 103-105; *Smith v. Alabama*, 124 U. S. 465, 479; *Nashville &c. Ry. Co. v. Alabama*, 128 U. S. 96, 99; *Peirce v. Van Dusen*, 78 Fed. Rep. 693, 698-700; *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 378; *Patterson v. Bark Eudora*, 190 U. S. 169, 176; *Johnson v. Southern Pacific Co.*, 196 U. S. 1; *Schlemmer v. Buffalo &c. Ry. Co.*, 205 U. S. 1; *Employers' Liability Cases*, 207 U. S. 463, 495; *Adair v. United States*, 208 U. S. 161, 176-178; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co. v. United States*, 222 U. S. 20.

As is well said in the brief prepared by the late Solicitor General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of

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commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroads and their employés, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employés are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk have no tendency to promote the safety of the employés or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employé

through the negligence of another, although confined to instances where the injured employé is engaged in interstate commerce, is not confined to instances where both employés are so engaged; and (3) because the act offends against the Fifth Amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract and (b) by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class and all their employés engaged in such commerce in a favored class.

Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employé resulting in injury to another was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employé; (b) the rule exonerating an employer from liability for injury sustained by an employé through the concurring negligence of the employer and the employé is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employés contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employé; (c) the rule that an employé was deemed to assume the risk of injury, even if due to the employer's negligence, where the employé voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's viola-

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tion of a statute enacted for the safety of his employés contributed to the injury; and (d) the rule denying a right of action for the death of one person caused by the wrongful act or neglect of another is displaced by a rule vesting such a right of action in the personal representatives of the deceased for the benefit of designated relatives.

Of the objection to these changes it is enough to observe:

First. "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U. S. 113, 134; *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *The Lottawanna*, 21 Wall. 558, 577; *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 417.

Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employés and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the

Constitution. *Lottery Case*, 188 U. S. 321, 353, 355; *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 203.

We are not unmindful that that end was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna*, 21 Wall. 558, 581-582; *Baltimore & Ohio R. R. v. Baugh*, 149 U. S. 368, 378-379.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employé through the negligence of another where all are engaged in interstate commerce, that power does not embrace instances where the negligent employé is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern Railway Co. v. United States*, 222 U. S. 20, 27, that power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases*, 207 U. S. 463, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employés while engaged in such commerce. And this being so, it is not a valid objection that the act embraces

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instances where the causal negligence is that of an employé engaged in intrastate commerce; for such negligence, when operating injuriously upon an employé engaged in interstate commerce, has the same effect upon that commerce as if the negligent employé were also engaged therein.

Next in order is the objection that the provision in § 5, declaring void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the Fifth Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, Burlington & Quincy Railroad Co. v. McGuire*, 219 U. S. 549; *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U. S. 186, and *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it.

Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employés of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employés in such commerce, not within the act, are exposed. But it does not follow that this classification is violative of the "due process of law"

clause of the Fifth Amendment. Even if it be assumed that that clause is equivalent to the "equal protection of the laws" clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley v. Carbonic Gas Co.*, 220 U. S. 61, 78. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employés for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205; *Louisville & Nashville Railroad Co. v. Melton*, 218 U. S. 36; *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*, 219 U. S. 35.

It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present act.

The third question, whether those regulations supersede the laws of the States in so far as the latter cover the same field, finds its answers in the following extracts from the opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316:

(p. 405) "If any one proposition could command the universal assent of mankind, we might expect it would be this:—that the government of the Union, though limited in its powers, is supreme within its

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sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof, * * * shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme: and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any State, to the contrary notwithstanding.'

(p. 426) "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."

And particularly apposite is the repetition of that principle in *Smith v. Alabama*, 124 U. S. 465, 473:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which

conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employés while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock v. Alling*, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482; *Nashville &c. Railway v. Alabama*, 128 U. S. 96, 99; *Reid v. Colorado*, 187 U. S. 137, 146. The inaction of Congress, however, in no wise affected its power over the subject. *The Lottawanna*, 21 Wall. 558, 581; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215. And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado & Santa Fe Railway Co. v. Hefley*, 158 U. S. 98, 104; *Southern Railway Co. v. Reid*, 222 U. S. 424; *Northern Pacific Railway Co. v. Washington*, 222 U. S. 370.

We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the Superior Courts of the State of Connecticut, and, in that case, the Supreme Court of Errors of the State answered the question in the negative. That, however,

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was not because the ordinary jurisdiction of the Superior Courts, as defined by the constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case, but because the Supreme Court of Errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the Superior Courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the State respecting the liability of employers to employes for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act and in others the different standards recognized by the laws of the State.

We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, "That the circuit courts of the United States shall have original cognizance, *concurrent with the courts of the several States*, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, *and arising under the Constitution or laws of the United States.*" August 13, 1888, 25 Stat. 433, c. 866,

§ 1. *Robb v. Connolly*, 111 U. S. 624, 637; *United States v. Barnes*, 222 U. S. 513. This is emphasized by the amendment engrafted upon the original act in 1910, to the effect that "The jurisdiction of the courts of the United States under this Act shall be *concurrent with that of the courts of the several States*, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it.

Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. We say "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion," because we are advised by the decisions of the Supreme Court of Errors that the Superior Courts of the State are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but

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also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant.

The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. As was said by this court in *Claffin v. Houseman*, 93 U. S. 130, 136, 137:

“The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. * * * If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws.

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The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. * * * It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506; and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employé or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to

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be applied in their adjudication are unlike those applied in other cases.

We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

In No. 289 several rulings in the progress of the cause, not covered by what already has been said, are called in question, but it suffices to say of them that they have been carefully considered, and that we find no reversible error in them.

In Nos. 170, 289 and 290 the judgments are affirmed, and in No. 120 the judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

CHAPTER XXXIX

TEXTS OF THE COMPENSATION AND STATE INSUR- ANCE ACTS

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BRITISH WORKMEN'S COMPENSATION ACT, 1906

(6 Edw. VII, c. 58)

An act to consolidate and amend the law with respect to Compensation to Workmen for Injuries suffered in the course of their Employment (21st, December, 1906).

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I

(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this act.

(2) Provided that

(a) The employer shall not be liable under this act in respect of any injury which does not disable the

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workman for a period of at least one week from earning full wages at the work at which he was employed.

(b) When the injury was caused by the personal negligence or willful act of the employer or of some person for whose act or default the employer is responsible, nothing in this act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this act or take proceedings independently of this act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this act, and shall not be liable to any proceedings independently of this act, except in case of such personal negligence or willful act as aforesaid.

(c) If it is proved that the injury to a workman is attributable to the serious and willful misconduct of the workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed.

(3) If any question arises in any proceedings under this act as to the liability to pay compensation under this act (including any question as to whether the person injured is a workman to whom this act applies), or as to the amount or duration of compensation under this act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this act, be settled by arbitration, in accordance with the second schedule to this act.

(4) If, within the time hereinafter in this act limited for taking proceedings, an action is brought to recover damages independently of this act for injury caused by any accident and is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the pro-

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visions of this act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this act. In any proceeding under this subsection, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this act.

(5) Nothing in this act shall affect any proceeding for a fine under the enactments relating to mines, factories, or workshops, or the application of any such fine.

II

(1) Proceedings for the recovery under this act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death:

Provided always that

(a) The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defense by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

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(b) The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

(2) Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language, the cause of the injury and the date at which the accident happened, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same at, or sending it by post in a registered letter addressed to, the residence or place of business of the person on whom it is to be served.

(4) Where the employer is a body of persons, corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to, the employer at the office, or, if there be more than one office, any one of the offices of such body.

III

(1) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workman, certifies that any scheme of compensation, benefit, or insurance for the workman of an employer, in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favorable to the workmen and their dependents than the corresponding scales contained in this act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favor of such scheme, the em-

ployer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this act shall apply notwithstanding any contract to the contrary made after the commencement of this act.

(2) The registrar may give a certificate to expire at the end of a limited period of not less than five years, and may from time to time renew with or without modifications such a certificate to expire at the end of the period for which it is renewed.

(3) No scheme shall be certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring, or which does not contain provisions enabling a workman to withdraw from the scheme.

(4) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the benefits conferred by any scheme no longer conform to the conditions stated in subsection (1) of this section, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall, after due provision has been made to discharge the liabilities already accrued, be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries

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and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the registrar under this act.

(8) The Chief Registrar of Friendly Societies may make regulations for the purpose of carrying this section into effect.

IV

(1) Where any person (in this section referred to as the principal) in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act references to the principal shall be substituted for the references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed:

Provided, that, where the contract relates to threshing, plowing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purpose of such work, he and he alone shall be liable under this act to pay compensation to any workman employed by him on such work.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation

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to the workman independently of this section, and all questions as to the right and amount of any such indemnity shall in default of agreement be settled by arbitration under this act.

(3) Nothing in this section shall be construed as preventing a workman recovering compensation under this act from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

V

(1) Where any employer has entered into a contract with any insurers in respect of any liability under this act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workmen, and upon any such transfers the insurer shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation.

(3) There shall be included among the debts which under section one of the Preferential Payments in Bankruptcy Act, 1888, and section four of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, are in the distribution of

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the property of a bankrupt and in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount, not exceeding in any individual case one hundred pounds, due in respect of any compensation the liability wherefor accrued before the date of the receiving order or the date of the commencement of the winding up, and those acts and the Preferential Payments in Bankruptcy Amendment Act, 1897, shall have effect accordingly. Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the first schedule to this act.

(4) In the case of the winding up of a company within the meaning of the Stannaries Act, 1887, such an amount as aforesaid, if the compensation is payable to a miner or the dependents of a miner, shall have a like priority as is conferred on wages of miners by section nine of that act, and that section shall have effect accordingly.

(5) The provisions of this section with respect to preferences and priorities shall not apply where the bankrupt or the company being wound up has entered into such a contract with insurers as aforesaid.

(6) This section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company.

VI

Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof:

(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this act

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for such compensation, but shall not be entitled to recover both damages and compensation; and

(2) If the workman has recovered compensation under this act the person by whom the compensation was paid (and any person who has been called on to pay an indemnity under the section of this act relating to subcontracting) shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this act.

VII

(1) This act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea fishing service, provided that such persons are workmen within the meaning of this act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications:

(a) The notice of accident and the claim for compensation may, except where the person injured is the master, be served on the master of the ship as if he were the employer, but where the accident happened and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident;

(b) In the case of the death of the master, seaman, or apprentice, the claim for compensation shall be made within six months after news of the death has been received by the claimant;

(c) Where an injured master, seaman, or apprentice is discharged or left behind in a British possession, or

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in a foreign country, depositions respecting the circumstances and nature of the injury may be taken by any judge or magistrate in the British possession, and by any British consular officer in the foreign country, and if so taken shall be transmitted by the person by whom they are taken to the Board of Trade, and such depositions or certified copies thereof shall in any proceedings for enforcing the claim be admissible in evidence as provided by sections six hundred and ninety-one and six hundred and ninety-five of the Merchant Shipping Act, 1894, and those sections shall apply accordingly;

(d) In the case of the death of a master, seaman, or apprentice, leaving no dependents, no compensation shall be payable, if the owner of the ship is under the Merchant Shipping Act, 1894, liable to pay the expenses of the burial;

(e) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice;

(f) Any sum payable by the way of compensation by the owner of a ship under this act shall be paid in full notwithstanding anything in section five hundred and three of the Merchant Shipping Act, 1894 (which relates to the limitation of a shipowner's liability in certain cases of loss of life, injury or damage), but the limitation on the owner's liability imposed by that section shall apply to the amount recoverable by way of indemnity under the section of this act relating to remedies both against employer and stranger as if the indemnity were damages for the loss of life or personal injury;

(g) Subsections (2) and (3) of section one hundred and seventy-four of the Merchant Shipping Act, 1894 (which relates to the recovery of wages of seamen lost with their ship), shall apply as respects proceedings for the recovery of compensation by dependents of masters, seamen and apprentices lost with their ship as they apply with respect to proceedings for the recovery of wages due to seamen and apprentices; and proceedings for the recovery of compensation shall in such a case be maintainable if the claim is made within eighteen months of the date at which the ship is deemed to have been lost with all hands;

(2) This act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel.

(3) This section shall extend to pilots to whom Part X of the Merchant Shipping Act, 1894, applies, as if a pilot when employed on any such ship as aforesaid were a seaman and a member of the crew.

VIII

(1) Where—

(1) The certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the third schedule to this act, and is thereby disabled from earning full wages at the work at which he was employed; or

(2) A workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease; or

(3) The death of a workman is caused by any such disease and the disease is due to the nature of any

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employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers; he or his dependents shall be entitled to compensation under this act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:

(a) The disablement or suspension shall be treated as the happening of the accident;

(b) If it be proved that the workman has at the time of entering the employment willfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable;

(c) The compensation shall be recoverable from the employer who last employed the workman during the last twelve months in the employment to the nature of which the disease was due;

Provided that—

(i) The workman or his dependents if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation; and

(ii) If that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst

in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable; and

(iii) If the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this act for settling the amount of the compensation;

(d) The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable;

(e) The employer to whom notice of the death, disablement, or suspension is to be given shall be the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due, and the notice may be given notwithstanding that the workman has voluntarily left his employment.

(f) If an employer or a workman is agreed by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final.

(2) If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the third schedule to this

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act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary.

(3) The Secretary of State may make rules regulating the duties and fees of certifying and other surgeons (including dentists) under this section.

(4) For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given. Provided that—

(a) Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine;

(b) Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death.

(5) In such cases, and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the power and duties of a certifying surgeon under this section, and this section shall be construed accordingly.

(6) The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modification as may be contained in the order.

(7) Where after inquiry held on the application of any

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employer or workman engaged in any industry to which this section applies, it appears that a mutual trade insurance company or society for insuring against the risks under this section has been established for the industry, and that a majority of the employers engaged in that industry are insured against such risks in the company or society and that the company or society consents, the Secretary of State may, by provisional order, require all employers in that industry to insure in the company or society upon such conditions and subject to such exceptions as may be set forth in the order. Where such a company or society has been established, but is confined to employers in any particular locality or of any particular class, the Secretary of State may for the purposes of this provision treat the industry, as carried on by employers in that locality or of that class, as a separate industry.

(8) A provisional order made under this section shall be of no force whatever unless and until it is confirmed by Parliament, and if, while the bill confirming any such order is pending in either House of Parliament, a petition is presented against the order, the bill may be referred to a select committee, and the petitioner shall be allowed to appear and oppose as in the case of private bills, and any act confirming any provisional order under this section may be repealed, altered, or amended by a provisional order made and confirmed in like manner.

(9) Any expenses incurred by the Secretary of State in respect of any such order, provisional order, or confirming bill shall be defrayed out of moneys provided by Parliament.

(10) Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this act.

IX

(1) This act shall not apply to persons in the naval or

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military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom this act would apply if the employer were a private person:

Provided that in the case of a person employed in the private service of the Crown, the head of that department of the royal household in which he was employed at the time of the accident shall be deemed to be his employer.

(2) The treasury may, by a warrant laid before Parliament, modify for the purposes of this act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that act, or any such warrant, may frame schemes with a view to their being certified by the Registrar of Friendly Societies under this act.

X

(1) The Secretary of State may appoint such legally qualified medical practitioners to be medical referees for the purposes of this act as he may, with the sanction of the treasury, determine, and remuneration of, and other expenses incurred by, medical referees under this act shall, subject to regulations made by the treasury, be paid out of moneys provided by Parliament.

Where a medical referee has been employed as a medical practitioner in connection with any case by or on behalf of an employer or workman or by any insurers interested, he shall not act as medical referee in that case.

(2) The remuneration of an arbitrator appointed by a judge of the county courts under the second schedule to this act shall be paid out of moneys provided by Parliament in accordance with regulations made by the treasury.

XI

(1) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this act, and at any time that ship is found in any port or river of England or Ireland, or within three miles of the coast thereof, a judge

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of any court of record in England or Ireland may, upon its being shown to him by any person applying in accordance with the rules of the court that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge requiring him to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings that may be instituted to recover such compensation and to pay such compensation and costs as may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly.

(2) In any legal proceeding to recover such compensation, the person giving security shall be made the defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding.

(3) Section six hundred and ninety-two of the Merchant Shipping Act, 1894, shall apply to the detention of a ship under this act as it applies to the detention of a ship under that act, and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected.

XII

(1) Every employer in any industry to which the Secretary of State may direct that this section shall apply shall, on or before such day in every year as the Secretary of State may direct, send to the Secretary of State a correct return specifying the number of injuries in respect of which compensation has been paid by him under this act during the previous year, and the amount of such compensation, together with such other particulars as to the compensation as

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the Secretary of State may direct, and in default of complying with this section shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding five pounds.

(2) Any regulations made by the Secretary of State containing such directions as aforesaid shall be laid before both Houses of Parliament as soon as may be after they are made.

XIII

In this act, unless the context otherwise requires, "Employer" includes any body of persons corporate or incorporate and the legal personal representative of a deceased employer, and where the services of a workman are temporarily lent or let on hire to another person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this act, be deemed to continue to be the employer of the workman whilst he is working for that other person;

"Workman" does not include any person employed otherwise than by way of manual labor whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an out-worker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labor, clerical work, or otherwise, and whether the contract is expressed or implied, or oral or in writing;

Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependents or other persons to whom or for whose benefit compensation is payable;

"Dependents" means such of the members of the workman's family as were wholly or in part dependent upon the

earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings or being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child and parent or grandparent respectively.

"Members of a family" means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister;

"Ship," "vessel," "seaman," and "port" have the same meaning as in the Merchant Shipping Act, 1894;

"Manager," in relation to a ship means the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner;

"Police force" means a police force to which the Police Act, 1890, or the Police (Scotland) Act, 1890, The City of London Police Force, The Royal Irish Constabulary, and The Dublin Metropolitan Police Force;

"Outworker" means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the materials or articles.

The exercise and performance of the powers and duties of a local or other public authority shall, for the purposes of this act be treated as the trade or business of the authority;

"County Court," "Judge of the county court," "registrar of the county court," "plaintiff," and "rules of court," as respects Scotland, means respectively sheriff court, sheriff, sheriff clerk, pursuer, and act of sederunt.

XIV

In Scotland, where a workman raises an action against his

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employer independently of this act in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the sheriff court and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880, shall, notwithstanding anything contained in that act, not be removed under that act or otherwise to the Court of Sessions, nor shall it be appealed to that court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the second schedule to this act in regard to an appeal from the decision of the sheriff on any question of law determined by him as arbitrator under this act shall apply.

XV

(1) Any contract (other than a contract substituting the provision of a scheme certified under the Workmen's Compensation Act, 1897, for the provisions of that act) existing at the commencement of this act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this act, be deemed to continue after the time at which the workman's contract of service would continue if notice of the determination thereof were given at the commencement of this act.

(2) Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this act shall, if re-certified by the Registrar of Friendly Societies, have effect as if it were a scheme under this act.

(3) The registrar shall re-certify any such scheme if it is proposed to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this act as to schemes.

(4) If any such scheme has not been so re-certified before the expiration from the commencement of this act, the certificate shall be revoked.

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XVI

(1) This act shall come into operation on the first day of July, nineteen hundred and seven, but, except so far as it relates to references to medical references, and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this act.

(2) The Workmen's Compensation Acts, 1897 and 1900, are hereby repealed, but shall continue to apply the cases where the accident happened before the commencement of this act, except to the extent to which this act applies to those cases.

XVII

This act may be cited as the Workmen's Compensation Act, 1906.

CALIFORNIA

(L. 1911, c. 399)

An act relating to the liability of employers for injuries or death sustained by their employés, providing for compensation for the accidental injury of employés, establishing an industrial accident board, making an appropriation therefor, defining its powers and providing for a review of its awards.

[Approved April 8, 1911]

The people of the State of California, represented in senate and assembly, do enact as follows:

ABROGATION OF DEFENSES

SECTION 1. In any action to recover damages for a personal injury sustained within this State by an employé while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of

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want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé, and it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury; and it shall not be a defense:

(1) That the employé either expressly or impliedly assumed the risk of the hazard complained of.

(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

SEC. 2. No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this act

LIABILITY FOR COMPENSATION

SEC. 3. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury accidentally sustained by his employés, and for his death if the injury shall approximately cause death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the accident, both the employer and employé are subject to the provisions of this act according to the succeeding sections hereof.

(2) Where, at the time of the accident, the employé is performing service growing out of and incidental to his employment and is acting within the line of his duty or course of his employment as such.

(3) Where the injury is approximately caused by accident, either with or without negligence, and is not so caused by the willful misconduct of the employé.

And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of this act, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death, except that when the injury was caused by the personal gross negligence or willful personal misconduct of the employer, or by reason of his violation of any statute designed for the protection of employés from bodily injury, the employé may, at his option, either claim compensation under this act, or maintain an action for damages therefor; in all other cases the liability of the employer shall be the same as if this and the succeeding sections of this act had not been passed, but shall be subject to the provisions of the preceding sections of this act.

SEC. 4. The following shall constitute employers subject to the provisions of this act within the meaning of the preceding section:

(1) The State, and each county, city and county, city, town, village and school districts and all public corporations, every person, firm, and private corporation (including any public service corporation) who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employé for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, at the time of such accident, have withdrawn such election, in the manner provided in the next section.

SEC. 5. Such election on the part of the employer shall be made by filing with the industrial accident board, hereinafter provided for a written statement to the effect that he accepts the provisions of this act, the filing of which state-

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ment shall operate, within the meaning of section three of this act, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he withdraws his election to be subject to the provisions of the act.

SEC. 6. The term "employé" as used in section three of this act shall be construed to mean:

(1) Every person in the service of the State, or any county, city and county, city, town, village or school district therein, and all public corporations, under any appointment or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city and county, city, town, village or school district therein or any public corporation, who shall have been elected or appointed for a regular term of one or more years, or to complete the unexpired portion of any such regular term.

(2) Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the State (who, for the purposes of the next section of this act, shall be considered the same and shall have the same power of contracting as adult employés), but not including any person whose employment is but casual and not in the usual course of the trade, business, profession or occupation of his employer.

SEC. 7. Any employé as defined in subsection (1) of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employé as defined in subsection (2) of the preceding section shall be deemed to have accepted and shall, within the meaning of

section 3 of this act be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

(1) The employer charged with such liability is subject to the provisions of this act, whether the employé has actual notice thereof or not; and

(2) At the time of entering into his contract of hire, express or implied, with such employer, such employé shall not have given to his employer notice in writing that he elects not to be subject to the provisions of this act, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employé shall, without giving such notice, remain in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act.

SCALE OF COMPENSATION

SEC. 8. Where liability for compensation under this act exists the same shall be as provided in the following schedule:

(1) Such medical and surgical treatment, medicines, medical and surgical supplies, crutches and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability, but not exceeding ninety days, to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employé in providing the same; provided, however, that the total liability under this subdivision shall not exceed the sum of \$100.00.

(2) If the accident causes disability, an indemnity which shall be payable as wages on the eighth day after the injured employé leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows:

(a) If the accident causes total disability, sixty-five per

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cent of the average weekly earnings during the period of such total disability; provided, that if the disability is such as not only to render the injured employé entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance shall be increased to one hundred per cent of the average weekly earnings.

(b) If the accident causes partial disability, sixty-five per cent of the weekly loss in wages during the period of such partial disability.

(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subsections (a) and (b), respectively.

(d) Said subsections (a), (b) and (c) shall be subject to the following limitations:

Aggregate disability indemnity for a single injury shall not exceed three times the average annual earnings of the employé.

If the period of disability does not last more than one week from the day the employé leaves work as the result of the accident no indemnity whatever shall be recoverable.

If the period of disability lasts more than one week from the day the employé leaves work as the result of the accident, no indemnity shall be recoverable for the first week of the period of such disability.

The aggregate disability period shall not, in any event extend beyond fifteen years from the date of the accident.

(3) The death of the injured employé shall not affect the obligation of the employer under subsections (1) and (2) of this section, so far as his liability shall have accrued and become payable at the time of the death, but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability benefits, provided that such

death was approximately caused by the accident causing such disability:

(a) In case the deceased employé leaves a person or persons wholly dependent upon him for support, the death benefit shall be a sum sufficient when added to the benefits which shall, at the time of death, have accrued and become payable under the provisions of subsection (2) of this section to make the total compensation for the injury and death (exclusive of the benefit provided for in subsection (1), equal to three times his annual average earnings, not less than \$1,000 nor more than \$5,000, the same to be payable, unless and until the industrial accident board shall otherwise direct, in weekly installments corresponding in amount to the weekly earnings of the employé.

(b) In case the deceased employé leaves no one wholly dependent on him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of three times such annual earnings of the employé as the annual amount devoted by the deceased to the support of the person or persons so partially dependent upon him for support bears to such average earnings, the same to be payable, unless and until the industrial accident board shall otherwise direct, in weekly installments, corresponding to the weekly earnings of the employés; provided, that the total compensation for the injury and death (exclusive of the benefit provided for in said subsection (1) shall not exceed three times such average annual earnings.

(c) In the event that the accident shall have approximately caused permanent disability, either total or partial, and the employé shall die within fifteen years after the date of the accident, liability for the death benefits provided for in said subsections (a) and (b) respectively shall exist only where the accident was the approximate cause of death within said period of fifteen years.

(d) If the deceased employé leaves no person dependent

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upon him for support, and the accident approximately causes death, the death benefit shall consist of the reasonable expenses of his burial not exceeding \$100.

METHOD OF COMPUTATION

SEC. 9. (1) The weekly earning referred to in section (8) shall be one fifty-second of the average annual earnings of the employé; average annual earnings shall not be taken at less than \$333.33, nor more than \$1,666.66, and between said limits shall be arrived at as follows:

(a) If the injured employé has worked in such employment, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned as such employé during the days when so employed.

(b) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employé of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place shall have earned during the days when so employed.

(c) In cases where the foregoing methods of arriving at the average annual earnings of the injured employé cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as having regard to the previous earnings of the injured employé, and of other employés of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the average earning capacity of the injured employé at the time of the injury in the employment in which he was working at such time.

(d) The fact that an employé has suffered a previous disability, or received compensation therefor, shall not preclude him from compensation for a later injury, or for death resulting therefrom, but in determining compensation for the later injury, or death resulting therefrom, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury, and shall be arrived at according to the previous provisions of this section.

(2) The weekly loss in wages referred to in section 8, shall consist of the difference between the average weekly earnings of the injured employé, computed according to the provisions of this section, and the weekly amount which the injured employé, in the exercise of reasonable diligence, will probably be able to earn, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.

(3) The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employé:

(a) A wife upon a husband.

(b) A husband upon a wife upon whose earnings he is partially or wholly dependent at the time of her death.

(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them. In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the death of the employé, and in such other cases if there is more than one person wholly dependent, the death benefit shall be divided equally among them and persons partially dependent,

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if any, shall receive no part thereof, and if there is more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

(4) Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the death of the employé, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions, and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees.

NOTICE OF INJURY

SEC. 10. No claim to recover compensation under this act shall be maintained unless within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and the address of the person injured, the time and the place where the accident occurred, and the nature of the injury, and signed by the person injured or some one in his behalf, or in case of his death, by a dependent or some one in his behalf, shall be served upon the employer by delivering to and leaving with him a copy of such notice or by mailing to him by registered mail a copy thereof in a sealed and posted envelope addressed to him at his last known place of business or residence. Such mailing shall constitute complete service. Provided, however, that any payment of compensation under this act, in whole or in part, made by the employer before the expiration of said thirty days shall be equivalent to the notice herein required, and provided further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for collections of the claim that there was no intention to mislead the employer, and that he was not in

fact misled thereby, and provided further that if no such notice is given and no payment of compensation made, within one year from the date of the accident, the right to compensation therefor shall be wholly barred.

EXAMINATION BY PHYSICIAN

SEC. 11. Wherever in case of injury the right to compensation under this act would exist in favor of any employé, he shall, upon the written request of his employer, submit from time to time to examination by a regular practicing physician, who shall be provided and paid for by the employer, and shall likewise submit to examination from time to time by any regular physician selected by said Industrial Accident Board, or any member or examiner thereof. The employé shall be entitled to have a physician provided and paid for by himself present at any such examination. So long as the employé, after such written request of the employer, shall refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended, and if he shall refuse to submit to such examination after direction by the board, or any member or examiner thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. Any physician who shall make or be present at any such examination may be required to testify as to the results thereof.

INDUSTRIAL ACCIDENT BOARD

SEC. 12. Any dispute or controversy concerning compensation under this act, including any in which the State may be a party, shall be submitted to a board consisting of three members, which shall be known as the industrial accident board. Within thirty days before this act shall take effect,

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the governor, by and with the advice and consent of the senate, shall appoint a member who shall serve two years, and another who shall serve three years, and another who shall serve four years. Thereafter such three members shall be appointed and confirmed for terms of four years each. Vacancies shall be filled in the same manner for the unexpired term. Each member of the board, before entering upon the duties of his office, shall take the oath prescribed by the constitution. A majority of the board shall constitute a quorum for the exercise of any of the powers or authority conferred by this act, and an award by a majority shall be valid. In case of a vacancy, the remaining two members of the board shall exercise all the powers and authority of the board until such vacancy is filled. Each member of the board shall receive an annual salary of three thousand six hundred dollars.

SEC. 13. The board shall organize by choosing one of its members as chairman. Subject to the provisions of this act, it may adopt its own rules of procedure and may change the same from time to time in its discretion. The board, when it shall deem it necessary to expedite its business, may from time to time employ one or more expert examiners for such length of time as may be required. It may also appoint a secretary and such clerical help as it may deem necessary. It shall fix the compensation of all assistants so appointed.

SEC. 14. The board shall keep its office at the city of San Francisco, and shall be provided by the secretary of state with a suitable room or rooms, necessary office furniture, stationery, and other supplies. The members of the board and its assistants, shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the board, but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board, before payment is made. All salaries and expenses authorized by this act shall be audited and paid

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out of the general funds of the State the same as other general state expenses are audited and paid.

NOTICE OF HEARING

SEC. 15. Upon the filing with the board by any party in interest of an application in writing stating the general nature of any dispute or controversy concerning compensation under this act, it shall fix a time for the hearing thereof, which shall not be more than forty days after the filing of such application. The board shall cause notice of such hearing to be given to each party interested by service of such notice on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the board, and hearings shall be held at such places as the board shall designate. Either party shall have the right to be present at any hearing, in person or by attorney or any other agent, and to present such testimony as shall be pertinent to the controversy before the board, but the board may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be had, or the time books and pay roll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time, direct any employé claiming compensation to be examined by a regular physician; the testimony so taken and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing. The board, or any member thereof, or any examiner appointed thereby shall have power and authority to issue subpoenas to compel the attendance of witnesses or parties, and the production of books, papers, or records, and to administer oaths. Obedience to such subpoenas shall be enforced by the superior court of any county, or city and county.

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SEC. 16. After final hearing by said board, it shall make and file (1) its findings upon all facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the party.

SEC. 17. Either party may present a certified copy of the award to the superior court for any county or city and county, whereupon said court shall, without notice, render a judgment in accordance therewith, which judgment, until and unless set aside as hereinafter provided, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with the like effect, be entered and docketed.

REVIEW BY COURT

SEC. 18. The findings of fact made by the board acting within its powers, shall, in the absence of fraud, be conclusive, and the award, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: within thirty days from the date of the award, any party aggrieved thereby may file with the board an application in writing for a review of such award, stating generally the grounds upon which such review is sought; within thirty days thereafter the board shall cause all documents and papers on file in the matter, and a transcript of all testimony which may have been taken therein, to be transmitted with their findings and award to the clerk of the superior court of that county or city and county wherein the accident occurred; such application for a review may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other, subject, however, to the provisions of law for a change of the place of trial or the calling of another judge. Upon such hearing the court may confirm or set aside such award, and any judgment which may theretofore have been rendered thereon, but the same shall be set aside only upon the following grounds:

(1) That the board acted without or in excess of its powers.

(2) That the award was procured by fraud.

(3) That the findings of fact by the board do not support the award.

REMANDING OF RECORD

SEC. 19. Upon the setting aside of any award the court may recommit the controversy and remand the record in the case to the board, for further hearing or proceedings, or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such award, and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties, or city and county.

SEC. 20. Any party aggrieved by a judgment entered upon the review of any award, may appeal therefrom within the time and in the manner provided for an appeal from the orders of the superior court; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as criminal causes on such calendar.

SEC. 21. No fees shall be charged by the clerk of any court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceedings to review an award, costs as between the parties shall be allowed or not in the discretion of the court.

SEC. 22. No claim for compensation under this act shall be assignable before payment, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, adjudged or paid, be subject to be taken for the debts of the party entitled thereto.

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SEC. 23. A claim for compensation for the injury or death of any employé, or any award or judgment entered thereon, shall be entitled to a preference over the other debts of the employer if and to the same extent as the wages of such employé shall be so preferred; but this section shall not impair the lien of any judgment entered upon any award.

INSURANCE PROVISIONS

SEC. 24. Nothing in this act shall affect the organization of any mutual or other insurance company, or any existing contract for insurance of employers' liability, nor the right of the employer to insure in mutual or other companies, in whole or in part, against such liability, or against the liability for the compensation provided for by this act, or to provide by mutual or other insurance, or by arrangement with his employés, or otherwise, for the payment to such employés, their families, dependents, or representatives, of sick, accident or death benefits, in addition to the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contributions, or other benefit whatsoever due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer, and in addition thereto, the right to enforce in his own name, in the manner provided in this act, the liability of any insurance company, which may, in whole or in part have insured the liability for such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance company, shall, to the extent thereof, be a bar to recovery against the other of the amount so paid, and provided further, that as between the employer and the insurance company, payment by either directly to the employé, or to the person entitled to compensation, shall be subject to the conditions of the insurance contract between them.

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SEC. 25. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract of insurance unless such company shall have been approved by the commissioner of insurance, as provided by law.

SEC. 26. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment of any assignable cause of action in tort which the employé or his personal representative may have against any other party for such injury or death, and such employer may enforce in his own name the liability of such other party.

POSTING OF NOTICES

SEC. 27. The board shall cause to be printed and furnished free of charge to any employer or employé such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of every employer who shall file a statement of election under this act, and the date of the filing thereof, and a separate book in which shall be entered and indexed the name of every employer who shall file his withdrawal of such election, and the date of the filing thereof; and a book in which shall be recorded all awards made by the board; and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause notice of the fact to be given to his employés, by posting and keeping continuously posted in a public and conspicuous place such notice thereof in the office, shop, or place of business of the employer, or by publishing, or in such other manner as the board

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shall deem most effective, and the board shall cause notice to be given in like manner of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and withdrawals of election, and of the time of the filing of the same, shall conclusively be imputed to all employés.

SEC. 28. Nothing in this act contained shall be construed as impairing the right of parties interested, after the injury or death of an employé, to compromise and settle upon such terms as they may agree upon, any liability which may be claimed to exist under this act on account of such injury or death, nor as conferring upon the dependents of any injured employé any interest which he may not divert by such settlement or for which he or his estate shall, in the event of such settlement by him, be accountable to such dependents or any of them.

SEC. 29. The sum of fifty thousand dollars is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, to be used by the industrial accident board in carrying out the purposes of this act, and the controller is hereby directed to draw his warrant on the general fund from time to time in favor of said industrial accident board for the amounts expended under its direction, and the treasurer is hereby authorized and directed to pay the same.

SEC. 30. All acts or parts of acts inconsistent with this act are hereby repealed.

*SEC. 31. This act shall take effect and be in force on and after the first day of September, A. D. 1911.

(L. 1912, c. 39)

An act imposing additional duties and conferring additional powers upon the industrial accident board, requiring certain statistical information, fixing a penalty for neglect or refusal to give such information to said board on request, requiring said board to report to the governor and au-

thorizing it to give publicity to the results of its researches and investigations and empowering said board to expend in carrying out the requirements of this act a sum not to exceed fifteen thousand dollars out of the funds heretofore appropriated for carrying out the purposes of an act entitled "An act relating to the liability of employers for injuries or death sustained by their employés, providing for compensation for the accidental injury of employés, establishing an industrial accident board, making an appropriation therefor, defining its powers and providing for a review of its awards, approved April 8, 1911."

[Approved January 2, 1912]

The people of the State of California do enact as follows:

SECTION 1. It shall be the duty of the industrial accident board to collect and compile statistics in regard to industrial accidents happening in this State resulting in personal injury and the cost and probable causes thereof, to investigate methods and devices for the prevention of such accidents, to investigate the comparative merits and relative cost of the various forms of insurance against liability and compensation for personal injuries resulting from industrial accidents.

SEC. 2. It shall be the duty of every employer of labor and of persons, firms, associations or corporations insuring against liability of employers for damages or compensation for personal injuries to employés by industrial accidents to furnish to the industrial accident board, upon the written request of a member thereof or an examiner appointed thereby, any and all information in his or its possession or under his or its control, pertinent to any of the matters referred to in the preceding section of this act. It shall be unlawful for the said board, or any member thereof, or any examiner appointed thereby, to divulge any information obtained from any employer of labor, or from any person,

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firm, association or corporation insuring against liability or compensation for industrial accidents, without the written consent of such employer, and of such person, firm, association or corporation; and any member of the said board, or any examiner appointed thereby who violates the provisions of this section of this act, shall be guilty of a misdemeanor, and for each and every such violation shall be, upon conviction thereof, punishable by a fine of not less than ten dollars (\$10) or more than one hundred dollars (\$100) or by imprisonment for not more than thirty (30) days, or by both such fine and imprisonment; and any information so obtained shall not be used against any such employer, person, firm, association or corporation, in any action brought against such employer, person, firm, association or corporation without the written consent of such employer, person, firm, association or corporation; *provided, however*, that this section shall not prevent the industrial accident board from making and publishing the results of its investigations and researches as provided in sections 5 and 6 of this act.

SEC. 3. Any member of the said board or examiner appointed thereby may, during reasonable business hours, enter any place of employment for the purpose of collecting facts and statistics and examining the provisions made for the safety and welfare of the employés therein.

SEC. 4. It shall be unlawful for any person, firm, corporation, agent or officer of a firm or corporation to fail, neglect or refuse to comply with any of the foregoing provisions of this act. Any person, firm, corporation, agent or officer of a firm or corporation that knowingly violates or omits to comply with any of the provisions of this act, shall be guilty of a misdemeanor for each and every offense and shall be, upon conviction thereof, punishable by a fine of not more than ten dollars.

SEC. 5. The industrial accident board shall report the results of its investigations covering the calendar year of 1912

to the governor of the State not later than February 1, 1913.

SEC. 6. The industrial accident board is authorized and empowered to make public and publish at such times and in such manner as it deems best, the result of its investigations and researches together with all such other information in relation to the liability of employers for damages or compensation for personal injuries to their employés as it may deem essential to fully acquaint the people of the State with the present law and its purpose and operation.

SEC. 7. The industrial accident board is hereby authorized to draw upon and expend for the purposes set forth in this act a sum not in excess of fifteen thousand dollars the same to be paid out of the sum of fifty thousand dollars appropriated for the use of said board under section 29 of an act entitled "An act relating to the liability of employers for injuries or death sustained by their employés, establishing an industrial accident board, making appropriation therefor, defining its powers and providing for a review of its awards. approved April 8, 1911," and the controller is hereby directed to draw his warrants in favor of said board for sums so expended when duly audited and approved by the state board of control, and the treasurer is hereby authorized and directed to pay the same.

(L. 1912, c. 53)

An act to provide for the keeping by employers of a record of injuries suffered by their employés; the reporting of such injuries to the industrial accident board by employers and attending physicians; the keeping by employers and insurance companies of records of claims for injuries suffered by employés and of compromises and settlements made therefor and requiring the reporting thereof to said board; and fixing a penalty for refusal or neglect to keep such records or make such reports.

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[Approved January 10, 1912]

The people of the State of California do enact as follows:

SECTION 1. Every employer of labor in this State shall keep a full, true and correct record of every personal injury suffered by his or its employés, arising out of or in the course of the employment, and resulting in death, or in disability extending over a period of a week or more. Within fifteen days after the happening of any such personal injury, a written report thereof shall be mailed by the employer to the industrial accident board informally, or on blanks to be provided by said board for this purpose. The said report shall contain the name of the employer, location of place of employment, nature of employment, name, address, age, nationality, sex and occupation of the injured person, length of time the injured person had worked at the particular employment previous to injury, date and hour of the day or night of the accident, the hour at which the injured employé began work on the date of the accident, nature of the injury, cause of the injury and rate of wages of the injured employé.

SEC. 2. Upon the termination of the disability of the injured employé or at the expiration of sixty days from the date of the accident, if the disability should extend beyond such period, the employer shall mail to the industrial accident board a supplemental report in relation to such disability, informally or on blanks to be provided by said board for this purpose. Such report must contain complete statements as to any claim made by the injured employé for indemnification for the injury sustained, payment made to him or in his behalf for medical, surgical or other care, claim for compensation or damages made for such injuries and any compromise or settlement of claim for compensation or damages entered into between the employer and such injured employé, his heirs, dependents or legal representative. In the event that any payment shall be made to such injured employé, or his dependents at any time thereafter, in com-

promise or settlement of a claim for compensation or damages, the amount of such payment shall be forthwith reported by the employer to the industrial accident board.

SEC. 3. Every physician who attends any such injured employé shall keep a record of this case. Within ten days from the date of his first attendance upon the injured employé, he shall mail to the industrial accident board a report, informally or on blanks to be provided by the said board for this purpose. The said report shall contain the name and address of the employer, name, address, sex and age of the injured employé, date of accident, description of the injury, probable nature and extent of disability. Upon the termination of the disability of the injured employé or the termination of said physician's attendance upon his case, he shall forthwith mail to the industrial accident board a supplemental report in relation to such case describing the physical condition of the injured employé, his disability, convalescence or discharge from the doctor's care.

SEC. 4. Every person, firm, association or corporation insuring against the liability of employers for damages or compensation for personal injury to employés or indemnifying any employer for, or on account of any such liability shall keep a record thereof, and shall within the first five days of each and every month, report in writing to the industrial accident board, informally or on blanks to be provided by said board for this purpose, every such injury to employés reported to it, every claim for damages or compensation for such injury filed with such person, firm, association or corporation and any settlement or compromise of any such claim for damages or compensation whether made with such injured employé, his heirs, dependents or legal representative.

SEC. 5. Every employer, physician or insurance company, firm or association, shall furnish to the industrial accident board all further information required by it in order to con-

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stitute a substantially complete and accurate history of each injury and the damages or compensation paid therefor.

SEC. 6. The record required to be kept in pursuance of the provisions of this act shall at all times be open to inspection of the industrial accident board or any member thereof, or any examiner appointed thereby. Any statement contained in such report shall not be admissible as evidence in any action arising out of the death or injury of any employé by reason of the accident reported.

SEC. 7. It shall be unlawful for any person, firm, corporation, agent or officer of a firm or corporation to fail, neglect or refuse to comply with any of the provisions of this act. Any person, firm, corporation, agent or officer of a firm or corporation that violates or omits to comply with any of the provisions of this act, shall be guilty of a misdemeanor for each and every offense and shall be, upon conviction thereof, punishable by fine of not less than ten dollars or more than one hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

SEC. 8. Nothing in this act shall apply to employers of labor engaged in farming, dairying, agricultural or horticultural pursuits, in poultry raising or domestic service.

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(L. 1911, c. 000)

An act to promote the general welfare of the people of this State, by providing compensation for accidental injuries or death suffered in the course of employment.

Be it enacted by the people of the State of Illinois, represented in the General Assembly:

SECTION 1. That any employer covered by the provisions of this act in this State may elect to provide and pay compensation for injuries sustained by any employé arising out of and in the course of the employment according to the provisions of this act, and thereby relieve himself from lia-

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bility for the recovery of damages, except as herein provided. If, however, any such employer shall elect not to provide and pay the compensation to any employé who has elected to accept the provisions of this act, according to the provisions of this act he shall not escape liability for injuries sustained by such employé arising out of and in the course of his employment because

(1) The employé assumed the risks of the employer's business.

(2) The injury or death was caused in whole or in part by the negligence of a fellow servant.

(3) The injury or death was proximately caused by the contributory negligence of the employé, but such contributory negligence shall be considered by the jury in reducing the amount of damages.

(a) Every such employer is presumed to have elected to provide and pay the compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the State Bureau of Labor Statistics.

(b) Every employer within the provisions of this act failing to file such notice shall be bound hereby as to all his employés who shall elect to come within the provisions of this act until January 1st of the next succeeding year and for terms of each year thereafter: *Provided*, any such employer may elect to discontinue the payments of compensation herein provided only at the expiration of any such calendar year, by filing notice of his intention to discontinue such payments, with the State Bureau of Labor Statistics, at least sixty days prior to the expiration of any such calendar year, and by posting such notice in the plant, shop, office or place of work, or by personal service, in written or printed form, upon such employé, at least sixty days prior to the expiration of any such calendar year.

(c) In the event any employer elects to provide and pay

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compensation provided in this act, then every employé of such employer, as a part of his contract of hiring or who may be employed at the time of the taking effect of this act and the acceptance of its provisions by the employer, shall be deemed to have accepted all the provisions of this act and shall be bound thereby unless within thirty days after such hiring and after the taking effect of this act, he shall file a notice to the contrary with the Secretary of the State Bureau of Labor Statistics, whose duty it shall be to immediately notify the employer, and if so notified, the employer shall not be deprived of any of his common-law or statutory defenses, and until such notice to the contrary is given to the employer, the measure of liability of the employer for any injury shall be determined according to the compensation provisions of this act: *Provided, however*, that before any such employé shall be bound by the provisions of this act, his employer shall either furnish to such employé personally at the time of his hiring, or post in a conspicuous place at the plant or in the room or place where such employé is to be employed, a legible statement of the compensation provisions of this act.

SEC. 2. The provisions of this act shall apply to every employer in the State engaged in the building, maintaining or demolishing of any structure; in any construction or electrical work; in the business of carriage by land or water and loading and unloading in connection therewith (except as to carriers who shall be construed to be excluded herefrom by the laws of the United States relating to liability to their employés for personal injuries while engaged in interstate commerce where such laws are held to be exclusive of all state regulations providing compensation for accidental injuries or death suffered in the course of employment); in operating general or terminal storehouses; in mining, surface mining, or quarrying; in any enterprise, or branch thereof, in which explosive materials are manufactured, handled or

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used in dangerous quantities; in any enterprise wherein molten metal or injurious gases or vapors or inflammable fluids are manufactured, used, generated, stored or conveyed in dangerous quantities; and in any enterprise in which statutory regulations are now or shall hereafter be imposed for the guarding, using or the placing of machinery or appliances, or for the protection and safeguarding of the employés therein, each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions and means of prosecution of the work therein, extraordinary risks to life and limb of the employé engaged therein are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to the employés therein.

SEC. 3. No common law or statutory right to recover damages for injury or death sustained by any employé while engaged in the line of his duty as such employé other than the compensation herein provided shall be available to any employé who has accepted the provisions of this act or to anyone wholly or partially dependent upon him or legally responsible for his estate: *provided*, that when the injury to the employé was caused by the intentional omission of the employer, to comply with statutory safety regulations, nothing in this act shall affect the civil liability of the employer. If the employer is a partnership, such omission must be that of one of the partners thereof, and if a corporation, that of any elective officer thereof.

SEC. 4. The amount of compensation which the employer who accepts the provisions of this act shall pay for injury to the employé which results in death, shall be:

(a) If the employé leaves any widow, child or children, or parent or other lineal heirs to whose support he had contributed within five years previous to the time of his death, a sum equal to four times the average annual earnings of the

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employé, but not less in any event than one thousand five hundred dollars, and not more in any event than three thousand five hundred dollars. Any weekly payments, other than necessary medical or surgical fees, shall be deducted in ascertaining such amount payable on death.

(b) If the employé leaves collateral heirs dependent upon his earnings, such a percentage of the sum provided in section (a) as the contributions which deceased made to the support of these dependents, bore to his earnings.

(c) If the employé leaves no widow or child or children, parents or lineal or collateral heirs dependent upon his earnings, a sum not to exceed one hundred and fifty dollars for burial expenses.

(d) All compensation provided for in this section to be paid in case injury results in death, shall be paid in installments equal to one-half the average earnings, at the same intervals at which the wages or earnings of the employé were paid while he was living; or if this shall not be feasible, then the installments shall be paid weekly.

(e) The compensation to be paid for injuries which result in death, as provided for in this section, shall be paid to the personal representative of the deceased employé and shall be distributed by such personal representative to the beneficiaries entitled thereto, in accordance with the laws of this State relating to the descent and distribution of personal property.

SEC. 5. The amount of compensation which the employer who accepts the provisions of this act shall provide and pay for injury to the employé resulting in disability shall be:

(a) Necessary first aid, medical, surgical and hospital services, also medicine and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of two hundred dollars, also necessary services of a physician or surgeon during such period of disability, unless such employé elects to secure his own physician or surgeon.

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(b) If the period of disability lasts for more than six working days, and such fact is determined by the physician or physicians, as provided in section 9, compensation equal to one-half of the earnings, but not less than five dollars nor more than twelve dollars per week, beginning on the eighth day of disability, and as long as the disability lasts, or until the amount of compensation paid equals the amount payable as a death benefit.

(c) If any employé, by reason of any accident arising out of and in the course of his employment, receive any serious and permanent disfigurement to the hands or face, but which injury does not actually incapacitate the employé from pursuing his usual or customary employment so that it is possible to measure compensation in accordance with the scale of compensation and the methods of computing the same herein provided, such employé shall have the right to resort to the arbitration provisions of this act for the purpose of determining a reasonable amount of compensation to be paid to such employé, but not to exceed one-quarter ($\frac{1}{4}$) of the amount of his compensation in case of death.

(d) If after the injury has been received it shall appear upon medical examination as provided for in section 9, that the employé has been partially, though permanently incapacitated from pursuing his usual and customary line of employment, he shall receive compensation equal to one-half of the difference between the average amount which he earned before the accident, and the average amount which he is earning, or is able to earn in some suitable employment or business after the accident, if such employment is secured.

(e) In the case of complete disability which renders the employé wholly and permanently incapable of work, compensation for the first eight years after the day the injury was received, equal to fifty per cent of his earnings, but not less than five dollars nor more than twelve dollars per week. If complete disability continues after the payment of a sum

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equal to the amount of the death benefit or after the expiration of the eight years, then a compensation during life, equal to eight per cent of the death benefit which would have been payable had the accident resulted in death. Such compensation shall not be less than ten dollars per month and shall be payable monthly.

(1) In case death occurs before the total of the payments made equals the amount payable as a death benefit, as provided in section 4, article (a), then in case the employé leaves any widow, child or children, or parents, or other lineal heirs, they shall be paid the difference between the compensation for death and the sum of such payment, but in no case shall this sum be less than five hundred dollars.

(2) In cases of complete disability, after compensation has been paid at the specified rate for a term of at least six months, the employé shall have the privilege of filing a petition in accordance with article (d) of section 4 of this act, asking for a lump sum payment of the difference between the sum of the payments received and the compensation to which he was entitled when such permanent disability had been definitely determined. For the purpose of this section, blindness or the total and irrecoverable loss of sight, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent paralysis of the legs or arms, and a fracture of the skull resulting in incurable imbecility or insanity, shall be considered complete and permanent disability: Provided, these specific cases of complete disability shall not, however, be construed as excluding other cases.

(3) In fixing the amount of the disability payments, regard shall be had to any payments, allowance or benefit which the employé may have received from the employer during the period of his incapacity, except the expenses of necessary medical or surgical treatment. In no event, ex-

cept in cases of complete disability as defined above, shall any weekly payment payable under the compensation plan in this section provided exceed twelve dollars per week, or extend over a period of more than eight years from the date of the accident. In case an injured employé shall be incompetent at the time when any right or privilege accrues to him under the provisions of this act, a conservator or guardian of the incompetent, appointed pursuant to law, may on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the employé himself had been competent and had claimed or exercised said right or privilege; and no limitations of time by this act provided, shall run so long as said incompetent employé had no conservator or guardian.

SEC. 5½. Any person entitled to compensation under this act, or any employer who shall be bound to pay compensation under this act, who shall desire to have such compensation, or any part thereof, paid in a lump sum, may petition any court of competent jurisdiction of the county in which the employé resided or worked at the time of disability or death, asking that such compensation be so paid, and if upon proper notice to the interested parties, and a proper showing made before such court, it appears to the best interest of the parties that such compensation be so paid, the court shall order payment of a lump sum, and where necessary, upon proper application being made, a guardian, conservator or administrator, as the case may be, shall be appointed for any person under disability who may be entitled to any such compensation, and an employer bound by the terms of this act, and liable to pay such compensation, may petition for such appointment where no such legal representatives have been appointed or acting for such party or parties so under disability.

SEC. 6. The basis for computing the compensation provided for in sections 4 and 5 of this act shall be as follows:

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(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year next preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employé was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

(c) The annual earnings if not otherwise determinable shall be regarded as three hundred times the average daily earnings in such computation.

(d) If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings, which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average on those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

(e) In the case of injured employés who earn either no wage or less than three hundred times the usual daily wage or earnings of the adult day laborers in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wage.

(f) As to employés in employments in which it is the custom to operate for a part of the whole number of working days in each year, such number shall be used instead of three hundred as a basis for computing the annual earnings, provided the minimum number of days which shall be used for the basis of the year's work shall be not less than two hundred.

(g) Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employé to cover any special expense entailed on him by the nature of his employment.

(h) In computing the compensation to be paid to any employé who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered.

SEC. 7. The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employés in his employment subject to the provisions of this act, and it shall not be in any way reduced by contributions from employés.

SEC. 8. If it is proved that the injury to the employé resulted from his deliberate intention to cause such injury, no compensation with respect to that injury shall be allowed.

SEC. 9. Any employé entitled to receive disability payments shall be required if requested by the employer to submit himself for examination at the expense of the employer to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employé, as soon as practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks, which examinations shall be for the purpose of determining the nature, extent and probable duration of the injury received by the employé, and for the purpose of adjusting the compensation which may be due the employé from time to time for disability according to the provisions of sections 4 and 5 of this

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act: *Provided, however*, that such examination shall be made in the presence of a duly qualified medical practitioner or surgeon provided and paid for by the employé, if such employé so desires, and in the event of a disagreement between said medical practitioners or surgeons as to the nature, extent or probable duration of said injury or disability, they may agree upon a third medical practitioner or surgeon, and, failing to agree upon such third medical practitioner or surgeon, the judge of the county court of the county where the employé resided or was employed at the time of the injury, shall within six days after petition filed in such court for that purpose, select a third medical practitioner or surgeon and the majority report of such three physicians as to the nature, extent and probable duration of such injury or disability shall be used for the purpose of estimating the amount of compensation payable under this act. If the employé refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this act during such period.

SEC. 10. Any question of law or fact arising in regard to the application of this law in determining the compensation payable hereunder shall be determined either by agreement of the parties or by arbitration as herein provided. In case any such question arises which cannot be settled by agreement, the employé and the employer shall each select a disinterested party and the judge of the county court or other court of competent jurisdiction, of the county where the injured employé resided or worked at the time of the injury, shall appoint a third disinterested party, such persons to constitute a Board of Arbitrators for the purpose of hearing and determining all such disputed questions of law or fact arising in regard to the application of this law in determining the compensation payable hereunder; and it shall be

the duty of both employé and employer to submit to such Board of Arbitrators not later than ten days after the selection and appointment of such arbitrators all facts or evidence which may be in their possession or under their control, relating to the questions to be determined by said arbitrators; and said Board of Arbitrators shall hear all the evidence submitted by both parties and they shall have access to any books, papers or records of either the employer or the employé showing any facts which may be material to the questions before them, and they shall be empowered to visit the place or plant where the accident occurred, to direct the injured employé to be examined by a regular practicing physician or surgeon, and to do all other acts reasonably necessary for a proper investigation of all matters in dispute. A copy of the report of the arbitrators in each case shall be prepared and filed by them with the State Bureau of Labor Statistics, and shall be binding upon both the employer and employé except for fraud and mistake: *Provided*, that either party to such arbitration shall have the right to appeal from such report or award of the arbitrators to the Circuit Court or the court that appointed the third arbitrator of the county where the injury occurred by filing a petition in such court within twenty days after the filing of the report of the arbitrators, and upon filing a good and sufficient bond, in the discretion of the court, and upon such appeal the questions in dispute shall be heard de novo, and either party may have a jury upon filing a written demand therefor with his petition.

SEC. 11. Any person entitled to payment under the compensation provisions of this act from the employer shall have the same preferential claim therefor against the property of the employer as is now allowed by law for a claim by such person against such employer for unpaid wages or for personal services, such preference to prevail against wage claims of all other employés, not entitled to compensation

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for injuries, and the payments due under such compensation provisions shall not be subject to attachment, levy, execution, garnishment or satisfaction of debts, except to the same extent and in the same manner as wages or earnings for personal service are now subject to attachment, levy, execution, garnishment or satisfaction of debts under the laws of this State, and shall not be assignable. Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this act relative to compensation for death received in the course of employment. No claim of any attorney-at-law for services in securing a recovery under this act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record which approval may be made in term time, or vacation.

SEC. 12. Any contract or agreement made by any employer or his agent or attorney with any employé or any other beneficiary of any claim under the provisions of this act within seven days after the injury shall be presumed to be fraudulent.

SEC. 13. No employé or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employé or beneficiary hereunder.

SEC. 14. No proceedings for compensation under the act shall be maintained unless notice of the accident has been given to the employer as soon as practicable after the happening thereof, and during such disability, and unless claim for compensation has been made within six months after the injury, "except that in case of an accident resulting in temporary disability, notice of such accident must be given to the employer within thirty days after said accident," or in case of the death of the employé or in the event of his incapacity, within six months after such death or incapacity, or in the event that payments have been made under the

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provisions of this act, within six months after such payments have ceased. No want or defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings by arbitration or otherwise by the employé, unless the employer proves that he is unduly prejudiced in such proceedings by such want, defect or inaccuracy. Notice of the accident shall, in substance, apprise the employer of the claim of compensation made and shall state the name and address of the employé injured, the approximate date and place of the accident, if known, and in simple language the cause thereof; which notice may be served personally or by registered mail, addressed to the employer at his last known residence or place of business: Provided, that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts and circumstances of such accident are known to such employer or his agent supervising work in which such employé was engaged at the time of the injury.

SEC. 15. This act shall not affect or disturb the continuance of any existing insurance, mutual aid, benefit or relief association or department, whether maintained in whole or in part by the employer or whether maintained by the employés, the payment of benefits of such association or department being guaranteed by the employer or by some person, firm or corporation for him: Provided, the employer contributes to such association or department an amount sufficient to insure the employés or other beneficiary the full compensation herein provided, exclusive of the cost of the maintenance of such association or department without any expense to the employé. This act shall not prevent the organization and maintaining under the insurance law of this State of any benefit or insurance company for the purpose of insuring against the compensation provided for in this act, the expense of which is maintained by the employer. This

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act shall not prevent the organization or maintaining under the insurance laws of this State of any voluntary mutual aid, benefit or relief association among employés for the payment of additional accident or sick benefits.

No existing insurance, mutual aid, benefit or relief association or department shall, by reason of anything herein contained, be authorized to discontinue its operation without first discharging its obligations to any and all persons carrying insurance in the same or entitled to relief or benefits therein.

Any contract of employment, relief benefit, or insurance or other device whereby the employé is required to pay any premium or premiums for insurance against the compensation provided for in this act shall be null and void, and any employer withholding from the wages of any employé any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine of not less than ten dollars nor more than twenty-five dollars in each offense in the discretion of the court.

SEC. 16. Any person who shall become entitled to compensation under the provisions of this act, shall, in the event of his inability to recover such compensation from the employer on account of his insolvency, be subrogated to all the rights of such employer against any insurance company or association which may have insured such employer, against loss growing out of the compensation required by the provisions of this act to be paid by such employer, and in such case only, a payment of the compensation that has accrued to the person entitled thereto in accordance with the provisions of this act, shall relieve such insurance company from such liability.

SEC. 17. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person, other than the employer, to pay damages in respect thereof:

(a) The employé or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation which he is entitled to under this act shall be reduced by the amount of damages recovered.

(b) If the employé or beneficiary has recovered compensation under this act, the employer by whom the compensation was paid or the person who has been called upon to pay the indemnity under sections 4 and 5 of this act, may be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employé to recover damages therefor.

SEC. 18. An agreement or award may, at any time after six months and before eighteen months from the date of filing, be reviewed, upon the application of either party, on the ground that the incapacity of the employé has subsequently increased or diminished. Such application shall be made to any court of competent jurisdiction and unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the employé and report upon his condition; and upon his report, and after hearing all the evidence the court may modify such agreement or award, as may be just, by ending, increasing or diminishing the compensation, subject to the limitations hereinbefore provided.

SEC. 19. It shall be the duty of every employer within the provisions of this act to send to the Secretary of the State Bureau of Labor Statistics in writing an immediate report of all accidents or injuries arising out of or in the course of the employment and resulting in death; it shall also be the duty of every such employer to report between the fifteenth and the twenty-fifth of each month to the Secretary of the State Bureau of Labor Statistics all accidents or injuries for which compensation has been paid under this act, which accidents or injuries entail a loss to the employé of more than one week's

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time, and in case the injury results in permanent disability, such report shall be made as soon as it is determined that such permanent disability has resulted or will result from such injury. All such reports shall state the date of the injury, including the time of day or night, the nature of the employer's business, the age, sex, conjugal condition of the injured person, the specific occupation of the injured person, the direct cause of the injury and the nature of the accident, the nature of the injury, the length of disability and, in case of death, the length of disability before death, the wages of the injured person, whether compensation has been paid to the injured person, or to his legal representative or his heirs or next of kin, the amount of compensation paid, the amount paid for physicians', surgeons' and hospital bills, and by whom paid, and the amount paid for funeral or burial expenses, if known. The making of reports as provided herein shall release the employer covered by the provisions of this act, from making reports to any other officer of the State.

SEC. 20. Any person, firm or corporation who undertakes to do or contracts with other to do, or have done for him, them or it, any work embraced in section 2 of this act, requiring such dangerous employment of employes in, or about premises where he, they or it, as principal or principals, contract to do such work or any part thereof, and does not require that the compensation provided for in this act shall be insured to the employé or beneficiary by any such person, firm or corporation undertaking to do such work and any such person, firm or corporation who creates or carries into operation any fraudulent scheme, artifice or device to enable him, them or it to execute such work without such person, firm or corporation being responsible to the employé or beneficiaries entitled to such compensation under the provisions of this act, such person, firm or corporation shall be included in the term "employer" and with the immediate employer shall be jointly and severally liable to pay the

compensation herein provided for, and be subject to all the provisions of this act.

SEC. 21. The term "employé" as used in this act shall be held to include only such persons as may be exposed to the necessary hazards of carrying on any employment or enterprise referred to in section 2 of this act. Persons whose employment is of a casual nature and who are employed otherwise than for the purpose of the employer's trade or business, are not included in the foregoing definition.

SEC. 22. Section 21 shall not be construed to include any employé engaged in any work of an incidental character unconnected with the dangers necessarily involved in carrying on any employment or enterprise referred to in section 2, or in any work of a clerical or administrative nature which does not expose the employé to the inherent hazards of any such employment or enterprise.

SEC. 23. Any willful neglect, refusal, or failure to do the things required to be done by any section, clause, or provision of this act, on the part of the person or persons herein required to do them, or any violation of any of the provisions or requirements hereof, or any attempt to obstruct or interfere with any court officer, member of an arbitration board herein provided for, or with the Secretary of the Bureau of Labor Statistics or his deputy, in the discharge of the duties herein imposed upon any of them, or any refusal to comply with the terms of this act, shall be deemed a misdemeanor, punishable by a fine of not less than ten dollars nor more than five hundred dollars, at the discretion of the court.

SEC. 23½. The right of action for damages caused by any such injury, at common law or any other statute in force prior to the taking of effect hereof shall not be affected by this act and every existing right of action for negligence or to recover damages for injury resulting in death, is continued and nothing in this act shall be construed as limiting the

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right of such action so accrued before the taking effect of this act.

SEC. 24. The invalidity of any portion of this act shall in no way affect the validity of any other portion thereof which can be given effect without such invalid part.

SEC. 25. This act shall take effect and be in force on and after the first day of May, 1912.

Approved by Governor, June 10th, 1911.

KANSAS

(L. 1911, c. 000)

An act to provide compensation for workmen injured in certain hazardous industries.

Be it enacted by the Legislature of the State of Kansas:

THE OBLIGATION

SECTION 1. If in any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act. Save as herein provided, no such employer shall be liable for any injury for which compensation is recoverable under this act; provided, that (a) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he is employed; (b) if it is proved that the injury to the workman results from his deliberate intention to cause such injury, or from his willful failure to use a guard or protection against accident required pursuant to any statute and provided for him, or a reasonable and proper guard and protection voluntarily furnished him by said employer, or solely from his deliberate breach of statutory regulations affecting safety of life or limb, or from his

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intoxication, any compensation in respect to that injury shall be disallowed.

RESERVATION OF LIABILITY FOR WRONG OR NEGLIGENCE IN
CERTAIN CASES

SEC. 2. Where the injury was proximately caused by the individual negligence, either of commission or omission, of the employer, including such negligence of the directors or of any managing officer or managing agent of such employer if a corporation, or of any of the partners if such employer is a partnership, or of any member if such employer is an association, but excluding the negligence of competent employés in the performance of their duties or of the employer's duty delegated to them, the existing liability of the employer shall not be affected by this act, but in such case the injured workman, or if death results from such injury, his dependents as herein defined, if they unanimously agree, otherwise his legal representative, may elect between any right of action against the employer upon such liability and the right to compensation under this act.

RESERVATION OF PENALTIES

SEC. 3. Nothing in this act shall affect the liability of the employer or employé to a fine or penalty under any other statute.

SUBCONTRACTING

SEC. 4. (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to

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pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed. (b) Where the principal is liable to pay compensation under this section, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workman independently of this section, and shall have a cause of action therefor. (c) Nothing in this section shall be construed as preventing a workman from recovering compensation under this act from the contractor instead of the principal. (d) This section shall not apply to any case where the accident occurred elsewhere than on or in, or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in, or about the execution of such work under his control or management. (e) A principal contractor, when sued by a workman of a subcontractor, shall have the right to implead the subcontractor. (f) The principal contractor who pays compensation voluntarily to a workman of a subcontractor shall have the right to recover over against the subcontractor.

REMEDIES BOTH AGAINST EMPLOYER AND STRANGER

SEC. 5. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability against some person other than the employer to pay damages in respect thereof. (a) The workman may take proceedings against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to recover both damages and compensation; and (b) If the workman has recovered compensation, under this act, the person by whom the compensation was paid, or any person who has

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been called on to indemnify him under the section of this act relating to subcontracting, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the workman to recover damages therefor.

APPLICATION OF THE ACT

SEC. 6. This act shall apply only to employment in the course of the employer's trade or business on, in, or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain; each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workman engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen. This act shall not apply in any case where the accident occurred before this act takes effect, and all rights which have accrued, by reason of any such accident, at the time of the publication of this act, shall be saved the remedies now existing therefor, and the court shall have the same power as to them as if this act had not been enacted.

SEC. 7. This act shall not be construed to apply to business or employments which, according to law, are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged.

SEC. 8. It is hereby determined that the necessity for this law and the reason for its enactment, exist only with regard to employers who employ a considerable number of persons. This act, therefore, shall only apply to employers by whom

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fifteen or more workmen have been [employed] continuously for more than one month at the time of the accident and who have elected or shall elect before the accident to come within the provision hereof; provided, however, that employers having less than fifteen workmen may elect to come within the provisions of this act in which case his employ  s shall be included herein, as hereinafter provided.

DEFINITIONS

SEC. 9. In this act, unless the context otherwise requires: (a) "Railway" includes street railways and interurbans, and "employment on railways" includes work in depots; power houses, round-houses, machine shops, yards, and upon the right of way, and in the operation of its engines, cars and trains, and to employ  s of express companies while running on railroad trains. (b) "Factory" means any premises wherein power is used in manufacturing, making, altering, adapting, ornamenting, finishing, repairing or renovating any article or articles for the purpose of trade or gain or of the business carried on therein, including expressly any brick yard, meat-packing house, foundry, smelter, oil refinery, lime burning plant, steam heating plant, electric lighting plant, electric power plant and water power plant, powder plant, blast furnace, paper mill, printing plant, flour mill, glass factory, cement plant, artificial gas plant, machine or repair shop, salt plant, and chemical manufacturing plant. (c) "Mine" means any opening in the earth for the purpose of extracting any minerals, and all underground workings, slopes, shafts, galleries and tunnels, and other ways, cuts and openings connected therewith, including those in the course of being opened, sunk or driven; and includes all the appurtenant structures at or about the openings of the mine, and any adjoining adjacent work place where the material from a mine is prepared for use or shipment. (d) "Quarry" means any place, not a mine, where stone, slate, clay, sand, gravel or other solid material is dug or otherwise extracted from the

earth for the purpose of trade or bargain or of the employer's trade or business. (e) "Electrical work" means any kind of work in or directly connected with the construction, installation, operation, alteration, removal or repair of wires, cables, switchboards or apparatus, used for the transmission of electrical current. (f) "Building work" means any work in the erection, construction, extension, decoration, alteration, repair or demolition of any building or structural appurtenance. (g) "Engineering work" means any work in the construction, alteration, extension, repair or demolition of a railway (as hereinbefore defined) bridge, jetty, dike, dam, reservoir, underground conduit, sewer, oil or gas well, oil tank, gas tank, water tower, or water works (including standpipes or mains) any caisson work or work in artificially compressed air, any work in dredging, pile driving, moving buildings, moving safes, or in laying, repairing or removing, underground pipes and connections, the erection, installing, repairing, or removing of boilers, furnaces, engines and power machinery (including belting and other connections), and any work in grading or excavating where shoring is necessary or power machinery or blasting powder, dynamite or other high explosives is in use (excluding mining and quarrying). (h) "Employer" includes any person or body of persons corporate or unincorporate, and the legal representatives of a deceased employer or the receiver or trustee of a person, corporation, association or partnership. (i) "Workman" means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, but does not include a person who is employed otherwise than for the purpose of the employer's trade or business. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependents, as hereinafter defined, or to his legal representative, or where he is a minor or incompetent, to his guardian. (j) "Dependents" means such members of the workman's

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family as were wholly or in part dependent upon the workman at the time of the accident. And "members of a family" for the purposes of this act means only widow or husband, as the case may be, and children; or if no widow, husband or children, then parents and grandparents, or if no parents or grandparents, then grandchildren; or if no grandchildren, then brothers and sisters. In the meaning of this section parents include step-parents, children include step-children, and grandchildren include step-grandchildren, and brothers and sisters include step-brothers and step-sisters, and children and parents include that relation by legal adoption.

INCOMPETENCY OF WORKMAN

SEC. 10. In case an injured workman is mentally incompetent or a minor, or where death results from the injury, in case any of his dependents as herein defined is mentally incompetent or a minor, at the time when any right, privilege or election accrues to him under this act, his guardian may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in this act provided for, shall run, so long as such incompetent or minor has no guardian.

AMOUNT OF COMPENSATION

SEC. 11. The amount of compensation under this act shall be, (a) Where death results from injury: (1) If the workman leaves any dependents wholly dependent upon his earnings, an amount equal to three times his earnings for the preceding year but not exceeding thirty-six hundred dollars and not less than twelve hundred dollars, provided, such earnings shall be computed upon the basis of the scale which he received or would have been entitled to receive had he been at work, during the thirty days next preceding the accident; and, if the period of the workman's employment by the said employer had been less than one year, then the amount of

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his earnings during the said year shall be deemed to be fifty-two times his average weekly earnings during the period of his actual employment under said employer; provided, that the amount of any payments made under this act and any lump sum paid hereunder for such injury from which death may thereafter result shall be deducted from such sum; and provided, however, that if the workman does not leave any dependents, citizens of and residing at the time of the accident in the United States or the Dominion of Canada, the amount of compensation shall not exceed in any case seven hundred and fifty dollars. (2) If the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings, such proportion of the amount payable under the foregoing provisions of this section, as may be agreed upon or determined to be proportionate to the injury to the said dependents; and (3) If he leaves no dependents, the reasonable expense of his medical attendance and burial, not exceeding one hundred dollars. (b) Where total incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, equal to fifty per cent of his average weekly earnings computed as provided in section 12 but in no case less than six dollars per week or more than fifteen dollars per week. (c) When partial incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, shall not be less than twenty-five per cent, nor exceed fifty per cent, based upon the average weekly earnings computed as provided in section 12, but in no case less than three dollars per week or more than twelve dollars per week; provided, however, that if the workman is under twenty-one years of age at the date of the accident and the average weekly earnings are less than \$10.00 his compensation shall not be less than seventy-five per cent of his average earnings. No such payment for total or partial disability shall extend over a period exceeding ten years.

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RULE FOR COMPENSATION

SEC. 12. For the purposes of the provisions of this act relating to "earnings" and "average earnings" of a workman, the following rules shall be observed: (a) "Average earnings" shall be computed in such manner as is best calculated to give the average rate per week at which the workman was being remunerated for the 52 weeks prior to the accident. Provided, that where by reason of the shortness of time during which the workman has been in the employment of his employer, or the casual nature or the terms of the employment, it is impracticable to compute the rate of remuneration, regard shall be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person employed, by a person in the same grade employed in the same class of employment and in the same district. (b) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his "earnings" and his "average earnings" shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident. (c) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by his absence of work due to illness or any other unavoidable cause. (d) Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed upon him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings. (e) In fixing the amount of the payment, allowance shall be made for any payment or benefit which the workman may

receive from the employer during his period of incapacity. (f) In the case of partial incapacity the payments shall be computed to equal, as closely as possible, fifty per cent of the difference between the amount of the "average earnings" of the workman before the accident, to be computed as herein provided, and the average amount which he is most probably able to earn in some suitable employment or business after the accident, subject, however, to the limitations hereinbefore provided.

PAYMENTS TO THE INJURED WORKMAN

SEC. 13. The payments shall be made at the same time, place and in the same manner as the wages of the workman were payable at the time of the accident, but a judge of any district court having jurisdiction upon the application of either party may modify such regulation in a particular case as to him may seem just.

COMPENSATION TO DEPENDENTS, ETC.

SEC. 14. Where death results from the injury and the dependents of the deceased workman as herein defined, have agreed to accept compensation, and the amount of such compensation and the apportionment thereof between them has been agreed to or otherwise determined, the employer may pay such compensation to them accordingly (or to an administrator if one be appointed) and thereupon be discharged from all further liability for the injury. Where only the apportionment of the agreed compensation between the dependents is not agreed to, the employer may pay the amount into any district court having jurisdiction or to the administrator of the deceased workman, with the same effect. Where the compensation has been so paid into court or to an administrator, the proper court, upon the petition of such administrator or any of such dependents, and upon such notice and proof as it may order shall determine the distribution thereof among such dependents. Where there are no dependents,

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medical and funeral expenses may be paid and distributed in like manner.

SEC. 15. The payments due under this act, as well as any judgment obtained thereunder, shall not be assignable or subject to levy, execution or attachment, except for medicine, medical attention and nursing and no claim of any attorney at law for services rendered in securing such indemnity or compensation or judgment shall be an enforceable lien thereon, unless the same has been approved in writing by the judge of the court where said case was tried; but if no trial was had, then by any judge of the district court of this state to whom such matter has been regularly submitted, on due notice to the party or parties in interest of such submission.

REPORTS AS TO ACCIDENTS AND COMPENSATION

SEC. 16. Employers affected by this act shall report annually to the state commissioner and factory inspector such reasonable particulars in regard thereto as he may require, including particulars as to all releases of liability under this act and any other law. The penalty for failure to report or for false report shall invalidate any such release of liability.

MEDICAL EXAMINATION

SEC. 17. (a) After an injury to the employé, if so requested by his employer, the employé must submit himself for examination at some reasonable time to a reputable physician selected by the employer, and from time to time thereafter during the pendency of his claim for compensation, or during the receipt by him for payment under this act, but he shall not be required to so submit himself, more than once in two weeks unless in accordance with such orders as may be made by the proper court or judge thereof. Either party may upon demand require a report of any examination made by the physician of the other party upon payment of a fee of one dollar therefor. (b) If the employé requests he shall be entitled to have a physician of his own selection present at the

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time to participate in such examinations. (c) Unless there has been a reasonable opportunity thereafter for such physician selected by the employé to participate in the examination in the presence of the physician selected by the employer, the physician selected by the employer shall not be permitted afterwards to give evidence of the condition of the employé in a dispute as to the injury. (d) Except as provided herein in this act there shall be no other disqualification or privilege preventing the testimony of a physician who actually makes an examination.

MEDICAL EXAMINATION BY NEUTRAL PHYSICIAN

SEC. 18. In case of a dispute as to the injury, the committee, or arbitrator as hereinafter provided, or the judge of the district court shall have the power to employ a neutral physician of good standing and ability, whose duty it shall be, at the expense of the parties to make an examination of the injured person, as the court may direct, on the petition of either or both the employer and employé or dependents.

TESTIMONY BY COURT PHYSICIAN

SEC. 19. If the employer or the employé has a physician make such an examination and no reasonable opportunity is given to the other party to have his physician make examination, then, in case of a dispute as to the injury, the physician of the party making such examination shall not give evidence before the court unless a neutral physician either has examined or then does examine the injured employé and give testimony regarding the injuries.

REFUSAL OF MEDICAL EXAMINATION

SEC. 20. If the employé shall refuse examination by physician selected by the employer, with the presence of a physician of his own selection, and shall refuse an examination by the physician appointed by the court, he shall have no right to compensation during the period from refusal until

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he, or some one in his behalf, notifies the employer or the court that he is willing to have such examination.

CERTIFICATE OF PHYSICIAN

SEC. 21. A physician making an examination shall give to the employer and to the workman a certificate as to the condition of the workman, but such certificate shall not be competent evidence of that condition unless supported by his testimony if his testimony would have been admissible.

NOTICE AND CLAIM

SEC. 22. Proceedings for the recovery of compensation under this act shall not be maintainable unless written notice of the accident, stating the time, place, and particulars thereof, and the name and address of the person injured, has been given within ten days after the accident, and unless a claim for compensation has been made within six months after the accident, or in case of death, within six months from the date thereof. Such notice shall be delivered by registered mail, or by delivery to the employer. The want of, or any defect in such notice, or in its service, shall not be a bar unless the employer proves that he has, in fact, been thereby prejudiced, or if such want or defect was occasioned by mistake, physical or mental incapacity or other reasonable cause, and the failure to make a claim within the period above specified shall not be a bar, if such failure was occasioned by a mistake, physical or mental incapacity or other reasonable cause.

AGREEMENTS

SEC. 23. Compensation due under this act may be settled by agreement. Every such agreement, other than a release, shall be in the form hereinafter provided.

ARBITRATIONS

SEC. 24. If compensation be not so settled by agreement:
(a) If any committee representative of the employer and the

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workman exists, organized for the purpose of settling disputes under this act, the matter shall, unless either party objects by notice in writing delivered or sent by registered mail to the other party before the committee meets to consider the matter, be settled in accordance with its rules by such committee or by an arbitrator selected by it. (b) If either party so objects, or there is no such committee, or the committee or the arbitrator to whom it refers the matter fails to settle it within sixty days from the date of the claim, the matter may be settled by a single arbitrator agreed on by the parties, or appointed by any judge of a court where an action might be maintained. The consent to arbitration shall be in writing and signed by the parties and may limit the fees of the arbitrator and the time within which the award must be made. And unless such consent and the order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue.

THE DUTIES OF ARBITRATOR

SEC. 25. The arbitrator shall not be bound by technical rules of procedure or evidence, but shall give the parties reasonable opportunity to be heard and act reasonably and without partiality. He shall make and file his award, with the consent to arbitration attached in the office of the clerk of the proper district court within the time limited in the consent, or if no time limit is fixed therein, within sixty days after his selection, and shall give notice of such filing to the parties by mail.

ARBITRATOR'S FEES

SEC. 26. The arbitrator's fees shall be fixed by the consent to arbitration or be agreed to by the parties before the arbitration, and if not so fixed or agreed to, they shall not exceed \$10.00 per day, for not to exceed ten days, and disbursements for expense. The arbitrator shall tax or apportion the costs of such fees in his discretion and shall add the

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amount taxed or apportioned against the employer to the first payment made under the award, and he shall note the amount of his fees on the award and shall have a lien therefor on the first payments due under the award.

FORM OF AGREEMENTS AND AWARD

SEC. 27. Every agreement for compensation and every award shall be in writing, signed and acknowledged by the parties or by the arbitrator or secretary of the committee hereinbefore referred to, and shall specify the amount due and unpaid by the employer to the workman up to the date of the agreement or award, and if any, the amount of the payments thereafter to be paid by the employer to the workman and the length of time such payments shall continue.

FILING AGREEMENTS, AWARDS, ETC.

SEC. 28. It shall be the duty of the employer to file or cause to be filed every release of liability hereunder, every agreement for an award of compensation, or modifying an agreement for or award of compensation, under this act, if not filed by the committee or arbitrator, to which he is a party, or a sworn copy thereof, in the office of the district court in the county in which the accident occurred within sixty days after it is made, otherwise it shall be void as against the workman. The said clerk shall accept, receipt for, and file any such release, agreement or award, without fee, and record and index it in the book kept for that purpose. Nothing herein shall be construed to prevent the workman from filing such agreement or award.

AGREEMENTS AND AWARDS—WHEN CANCELED

SEC. 29. At any time within one year after an agreement or award has been so filed, a judge of a district court having jurisdiction may, upon the application of either party, cancel such agreement or award, upon such terms as may be just,

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if it be shown to his satisfaction that the workman has returned to work and is earning approximately the same or higher wages as or than he did before the accident, or that the agreement or award has been obtained by fraud or undue influence, or that the committee or arbitrator making the award acted without authority, or was guilty of serious misconduct, or that the award is grossly inadequate or grossly excessive, or if the employé absents himself so that a reasonable examination of his condition cannot be made, or has departed beyond the boundaries of the United States or Canada.

STAYING PROCEEDINGS UPON AGREEMENT OR AWARD

SEC. 30. At any time after the filing of an agreement or award and before judgment has been granted thereon, the employer may stay proceedings thereon by filing in the office of the clerk of the district court wherein such agreements or award is filed: (a) A proper certificate of a qualified insurance company that the amount of the compensation to the workman is insured by it: (b) A proper bond undertaking to secure the payment of the compensation. Such certificate or bond shall first be approved by a judge of the said district court.

JUDGMENT UPON AGREEMENT OR AWARD

SEC. 31. At any time after an agreement or award has been filed, the workman may apply to the said district court for judgment against the employer for a lump sum equal to eighty per cent of the amount of payments due and unpaid and prospectively due under the agreement or award; and, unless the agreement or award be stayed, modified or canceled, or the liability thereunder be redeemed or otherwise discharged, the court shall examine the workman under oath, and if satisfied that the application is made because of doubt as to the security of his compensation, shall com-

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pute the sum and direct judgment accordingly, as if in an action; provided, that if the employer shall give a good and sufficient bond, approved by the court, no execution shall issue on such judgment so long as the employer continues to make payments in accordance with the original agreement or award undiminished by the discount.

REVIEW OR MODIFICATION OF AGREEMENT OR AWARD

SEC. 32. An agreement or award may be modified at any time by a subsequent agreement; or, at any time after one year from the date of filing; it may be reviewed, upon the application of either party on the ground that the incapacity of the workman has subsequently increased or diminished. Such application shall be made to the said district court; and, unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the workman and report to it; and upon his report and after hearing the evidence of the parties, the court may modify such agreement or award, as may be just, by ending, increasing or diminishing the compensation, subject to the limitations hereinbefore provided.

REDEMPTION OF LIABILITY

SEC. 33. Where any payment has been continued for not less than six months the liability therefor may be redeemed by the employer by the payment to the workman of a lump sum of an amount equal to eighty per cent of the payments which may become due according to the award, such amount to be determined by agreement, or, in default thereof, upon application, to a judge of a district court having jurisdiction. Upon paying such amount the employer shall be discharged from all further liability on account of the injury, and be entitled to a duly executed release, upon filing which or other due proof of payment, the liability upon any agreement or award shall be discharged of record.

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INSURANCE

SEC. 34. Where the payment of compensation to the workman is insured, by a policy or policies, at the expense of the employer, the insurer shall be subrogated to the rights and duties under this act of the employer, so far as appropriate.

COURTS

SEC. 35. All references hereinbefore to a district court of the state of Kansas having jurisdiction of a civil action between the parties shall be construed as relating to the then existing code of civil procedure. Such court shall make all rules necessary and appropriate to carry out the provisions of this act.

ACTIONS

SEC. 36. A workman's right to compensation under this act, may, in default of agreement or arbitration, be determined and enforced by action in any court of competent jurisdiction. In every such action the right to trial by jury shall be deemed waived and the case tried by the court without a jury, unless either party, with his notice of trial, or when the case is placed upon the calendar—demand a jury trial. The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under this act, with interest on the payments overdue, or, in the discretion of the trial judge, for periodical payments as in an award. Where death results from injury, the action shall be brought by the dependent or dependents entitled to the compensation or by the legal representative of the deceased for the benefit of the dependents as herein defined; and in such action the judgment may provide for the proportion of the award to be distributed to or between the several dependents; otherwise such proportions shall be determined by the proper

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probate court. An action to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with an action of compensation under this act. No action or proceeding provided for in this act shall be brought or maintained outside of the state of Kansas, and notice thereof may be given by publication against nonresidents of the state in the manner now provided by article 7 of Chapter 95, General Statutes of Kansas of 1909 so far as the same may be applicable, and by personal service of a true copy of the first publication within twenty-one days after the date of the said first publication unless excused by the court upon proper showing that such service cannot be made.

WHEN THE CAUSE OF ACTION ACCRUES

SEC. 37. The cause of action shall be deemed in every case, including a case where death results from the injury to have accrued to the injured workman at the time of the accident; and the time limited in which to commence an action for compensation therefor shall run as against him, his legal representatives and dependents from that date.

ATTORNEY'S LIENS

SEC. 38. Contingent fees of attorneys for services and proceedings under this act shall in every case be subject to approval by the court.

CERTIFICATE REQUIRED

SEC. 39. If the superintendent of insurance by and with the advice and written approval of the attorney general certifies that any scheme of compensation, benefit or insurance for the workman of an employer in any employment to which this act applies, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favorable to the workmen and their

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dependents than the corresponding scales contained in this act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this act or their equivalents the employer may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this act; and thereupon the employer shall be liable only in accordance with that scheme; but, save as aforesaid, this act shall not apply notwithstanding any contract to the contrary made after this act becomes a law.

CONDITION TO CERTIFICATE

SEC. 40. No scheme shall be so certified which does not contain suitable provisions for the equitable distribution of any moneys or securities held for the purpose of the scheme, after due provision has been made to discharge the liabilities already accrued, if and when such certificate is revoked or the scheme otherwise terminated.

CERTIFICATE TO BE REVOCABLE

SEC. 41. If at any time the scheme no longer fulfills the requirements of this article, or is not fairly administered, or other valid and substantial reasons therefor exist, the superintendent of insurance by and with the attorney general shall revoke the certificate and the scheme shall thereby be terminated.

INFORMATION TO BE REPORTED

SEC. 42. Where a certified scheme is in effect the employer shall answer all such inquiries and furnish all such accounts in regard thereto as may be required by the superintendent.

SEC. 43. The superintendent of insurance may make all rules and regulations necessary to carry out the purposes of the four preceding sections.

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SEC. 44. All employers as defined by this act who shall elect to come within the provisions of this act and of all acts amendatory hereof shall do so by filing a statement to such effect with the secretary of state of this state at any time after taking effect of this act, which election shall be binding upon such employer for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or of any succeeding year, file in the office of the secretary of state a notice in writing to the effect that he withdraws his election to be subject to the provisions of this act. Notice of such election or withdrawal shall be forthwith posted by such employer in conspicuous places in and about his place of business.

SEC. 45. Every employé entitled to come within the provisions of this act, shall be presumed to have done so unless he serve written notice, before injury, upon his employer that he elects not to accept thereunder and thereafter any such employé desiring to change his election shall only do so by serving written notice thereof upon his employer. Any contract wherein an employer requires of an employé as a condition of employment that he shall elect not to come within the provisions of this act shall be void.

SEC. 46. In any action to recover damages for a personal injury sustained within this state by an employé (entitled to come within the provisions of this act) while engaged in the line of his duty as such or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of due care of the employer or of any officer, agent or servant of the employer, where such employer is within the provisions hereof, it shall not be a defense to any employer (as herein in this act defined) who shall not have elected, as hereinbefore provided, to come within the provisions of this act: (a) That the employé either expressly or

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impliedly assumed the risk of the hazard complained of; (b) that the injury or death was caused in whole or in part by the want of due care of a fellow servant; (c) that such employé was guilty of contributory negligence but such contributory negligence of said employé shall be considered by the jury in assessing the amount of recovery.

SEC. 47. In an action to recover damages for a personal injury sustained within this state by an employé (entitled to come within the provisions of this act) while engaged in the line of his duty as such or for death resulting from personal injury so sustained in which recovery is sought upon the ground of want of due care of the employer or of any officer, agent or servant of the employer, and where such employer has elected to come and is within the provisions of this act as hereinbefore provided, it shall be a defense for such employer in all cases where said employé has elected not to come within the provisions of this act; (a) that the employé either expressly or impliedly assumed the risk of the hazard complained of; (b) that the injury or death was caused in whole or in part by the want of due care of a fellow servant; (c) that said employé was guilty of contributory negligence; provided, however, that none of these defenses shall be available where the injury was caused by the willful or gross negligence of such employer, or of any managing officer, or managing agent of said employer, or where under the law existing at the time of the death or injury such defenses are not available.

SEC. 48. Nothing in this act shall be construed to amend or repeal section 6999 of the General Statutes of Kansas of 1909 or House bill No. 240 of the Session of 1911, the same being "An act relating to the liability of common carriers by railroads to their employés in certain cases, and repealing all acts and parts of acts so far as the same are in conflict herewith."

SEC. 49. This act shall take effect and be in force from and

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after its publication in the statute book, and the first day of January, 1912.

MASSACHUSETTS

(L. 1911, c. 751, as amended by L. 1912, c. 571)

An Act relative to payments to employ  s for personal injuries received in the course of their employment and to the prevention of such injuries.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

PART I**MODIFICATION OF REMEDIES**

SECTION 1. In an action to recover damages for personal injury sustained by an employ   in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employ   was negligent;
2. That the injury was caused by the negligence of a fellow employ  ;
3. That the employ   had assumed the risk of the injury.

SEC. 2. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers.

SEC. 3. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by employ  s of a subscriber.

SEC. 4. The provisions of sections one hundred and twenty-seven to one hundred and thirty-five, inclusive, and of one hundred and forty-one to one hundred and forty-three, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, and of any acts in

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amendment thereof, shall not apply to employ  s of a subscriber while this act is in effect.

SEC. 5. An employ   of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employ   shall not have given the said notice within thirty days of notice of such subscription. An employ   who has given notice to his employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after it is delivered to the employer or his agent. (Subject to approval Industrial Board. L. 1912, c. 666.)

PART II

PAYMENTS

SECTION 1. If an employ  , who has not given notice of his claim of common-law rights of action, as provided in Part I, section five, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of the injury.

SEC. 2. If the employ   is injured by reason of his serious and willful misconduct, he shall not receive compensation.

SEC. 3. If the employ   is injured by reason of the serious and willful misconduct of a subscriber or of any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the subscriber shall repay to the association the extra compensation paid to the employ  . If a claim is made under this section the subscriber shall be allowed to appear and defend against such claims only.

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SEC. 4. No compensation shall be paid under this act for any injury which does not incapacitate the employé for a period of at least two weeks from earning full wages, but if incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury.

SEC. 5. During the first two weeks after the injury, the association shall furnish reasonable medical and hospital services, and medicines when they are needed.

SEC. 6. If death results from the injury, the association shall pay the dependents of the employé, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week, for a period of three hundred weeks from the date of the injury. If the employé leaves dependents only partly dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employé to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employé before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

SEC. 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employé:

(a) A wife upon a husband with whom she lives at the time of his death.

(b) A husband upon a wife with whom he lives at the time of her death.

(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from

earning) upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

SEC. 8. If the employé leaves no dependents, the association shall pay the reasonable expense of his last sickness and burial, which shall not exceed two hundred dollars.

SEC. 9. While the incapacity for work resulting from the injury is total, the association shall pay the injured employé a weekly compensation equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor the amount more than three thousand dollars.

SEC. 10. While the incapacity for work resulting from the injury is partial, the association shall pay the injured employé a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury.

SEC. 11. In case of the following specified injuries the amounts hereinafter named shall be paid in addition to all other compensations:

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(a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one foot, or the reduction to one-tenth of normal vision in both eyes with glasses, one-half of the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of one hundred weeks.

(b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the reduction to one-tenth of normal vision in either eye with glasses, one-half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of fifty weeks.

(c) For the loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, one-half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twenty-five weeks.

(d) For the loss by severance of at least one phalange of a finger, thumb, or toe, one-half the average weekly wages of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twelve weeks.

SEC. 12. No savings or insurance of the injured employé, independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than the association be considered in fixing the compensation under this act.

SEC. 13. The compensation payable under this act in case of the death of the injured employé shall be paid to his legal representative; or, if he has no legal representative, to his dependents; or, if he leaves no dependents, to the persons to whom payment of the expenses for the last sickness and burial are due. If the payment is made to the legal representative of the deceased employé, it shall be paid by him to the dependents or other persons entitled thereto under this act.

SEC. 14. If an injured employé is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege.

SEC. 15. No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the association or subscriber as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employé, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

SEC. 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his legal representative or by a person in his behalf or by a person to whom payments may be due under this act or by a person in his behalf. Any form of written communication signed by any person who may give the notice as above provided, which contains the information that the person has been so injured, giving the time, place and cause of the injury, shall be considered a sufficient notice.

SEC. 17. The notice shall be served upon the association, or an officer or agent thereof, or upon the subscriber, or upon one subscriber, if there are more subscribers than one, or upon any officer or agent of a corporation if the subscriber is a corporation, by delivering the same to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

SEC. 18. A notice given under the provisions of this act

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shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead and the association was in fact misled thereby. Want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury.

SEC. 19. After an employé has received an injury, and from time to time thereafter during the continuance of his disability he shall, if so requested by the association or subscriber, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the commonwealth, furnished and paid for by the association or subscriber. The employé shall have the right to have a physician provided and paid for by himself present at the examination. If he refuses to submit himself for the examination, or in any way obstructs the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

SEC. 20. No agreement by an employé to waive his rights to compensation under this act shall be valid.

SEC. 21. No payment under this act shall be assignable or subject to attachment, or be liable in any way for any debts.

SEC. 22. Whenever any weekly payment has been continued for not less than six months, the liability therefor may in unusual cases be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board.

SEC. 23. The claim for compensation shall be in writing and shall state the time, place, cause and nature of the injury; it shall be signed by the person injured or by a person in his behalf, or, in the event of his death, by his legal representative or by a person in his behalf, or by a person to whom payments may be due under this act or by a person in his behalf, and shall be filed with the industrial accident board.

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The failure to make a claim within the period prescribed by section fifteen shall not be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause.

PART III

PROCEDURE

SECTION 1. There shall be an industrial accident board consisting of five members, to be appointed by the governor, by and with the advice and consent of the council, one of whom shall be designated by the governor as chairman. The term of office of members of this board shall be five years, except that when first constituted one member shall be appointed for one year, one for two years, one for three years, one for four years, and one for five years. Thereafter one member shall be appointed every year for the full term of five years.

SEC. 2. The salaries and expenses of the board shall be paid by the commonwealth. The salary of the chairman shall be five thousand dollars a year, and the salary of the other members shall be forty-five hundred dollars a year each. The board may appoint a secretary at a salary of not more than three thousand dollars a year, and may remove him. It shall also be allowed an annual sum, not exceeding ten thousand dollars, for clerical service, and traveling and other necessary expenses. The board shall be provided with an office in the state house or in some other suitable building in the city of Boston, in which its records shall be kept.

SEC. 3. The board may make rules not inconsistent with this act for carrying out the provisions of the act. Process and procedure under this act shall be as summary as reasonably may be. The board or any member thereof shall have the power to subpoena witnesses, administer oaths and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. The fees

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for attending as a witness before the industrial accident board shall be one dollar and fifty cents a day; for attending before an arbitration committee fifty cents a day; in both cases five cents a mile for travel out and home.

The superior court shall have power to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records.

SEC. 4. If the association and the injured employé reach an agreement in regard to compensation under this act, a memorandum of the agreement shall be filed with the industrial accident board and, if approved by it, thereupon the memorandum shall for all purposes be enforceable under the provisions of Part III, section eleven. Such agreements shall be approved by said board only when the terms conform to the provisions of this act.

SEC. 5. If the association and the injured employé fail to reach an agreement in regard to compensation under this act, either party may notify the industrial accident board who shall thereupon call for the formation of a committee of arbitration. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board and shall act as chairman. The other two members shall be named, respectively, by the two parties. If the subscriber has appeared under the provisions of Part II, section three, the member named by the association shall be subject to his approval. If a vacancy occurs it shall be filled by the party whose representative is unable to act.

The arbitrators appointed by the parties shall be sworn by the chairman as follows: I do solemnly swear that I will faithfully perform my duty as arbitrator and will not be influenced in my decision by any feeling of friendship or partiality toward either party. So help me God.

SEC. 6. It shall be the duty of the industrial accident

board, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The board shall designate one of its members to act as chairman, and, if either party does not appoint its members on this committee within seven days after notification, as above provided, or after a vacancy has occurred, the board or any member thereof shall fill the vacancy and notify the parties to that effect.

SEC. 7. The committee on arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the city or town where the injury occurred, and the decision of the committee, together with a statement of the evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the industrial accident board. Unless a claim for a review is filed by either party within seven days, the decision shall be enforceable under the provisions of Part III, section eleven.

SEC. 8. The industrial accident board or any member thereof may appoint a duly qualified impartial physician to examine the injured employé and to report. The fee for this service shall be five dollars and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases.

SEC. 9. The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial accident board or any member thereof may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the association, which shall deduct an amount equal to one-third of the sum from any compensation found due the employé.

SEC. 10. If a claim for a review is filed, as provided in Part III, section seven, the board shall hear the parties and may hear evidence in regard to any or all matters pertinent

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thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter of right be entitled to a second hearing on any question of fact.

SEC. 11. Any party in interest may present certified copies of an order or decision of the board, a decision of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the board, and all papers in connection therewith, to the superior court for the county in which the injury occurred or for the county of Suffolk, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though duly rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact, or where the decree is based upon a decision of an arbitration committee or a memorandum of agreement, and that there shall be no appeal from a decree based upon an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board. Upon the presentation to it of a certified copy of a decision of the industrial accident board ending, diminishing or increasing a weekly payment under the provisions of Part III, section twelve, the court shall revoke or modify the decree to conform to such decision.

SEC. 12. Any weekly payment under this act may be reviewed by the industrial accident board at the request of the association or of the employé; and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the condition of the employé warrants such action.

SEC. 13. Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial accident board.

SEC. 14. If the committee of arbitration, industrial accident board, or any court before whom any proceedings are brought under this act determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, it shall assess the whole cost of the proceedings upon the party who has so brought, prosecuted or defended them.

SEC. 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both; and if compensation be paid under this act, the association may enforce in the name of the employé, or in its own name and for its own benefit, the liability of such other person.

SEC. 16. All questions arising under this act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the industrial accident board. The decisions of the industrial accident board shall for all purposes be enforceable under the provisions of Part III, section eleven.

SEC. 17. If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if such a contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employés immediately employed by the subscriber, be liable to pay compensation under this act to those employés, the association shall pay to such employés any compensation which would be payable to

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them under this act if the independent or subcontractors were subscribers. The association, however, shall be entitled to recover indemnity from any other person who would have been liable to such employés independently of this section, and if the association has paid compensation under the terms of this section, it may enforce in the name of the employé, or in its own name and for the benefit of the association, the liability of such other person. This section shall not apply to any contract of an independent or subcontractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the subscriber, nor to any case where the injury occurred elsewhere than on, in, or about the premises on which the contractor has undertaken to execute the work for the subscriber or which are under the control or management of the subscriber.

SEC. 18. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employés in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for the purpose. Upon the termination of the disability of the injured employé or, if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental report on blanks to be procured from the board for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employé, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the board. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offence.

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PART IV

THE MASSACHUSETTS EMPLOYÉS' INSURANCE ASSOCIATION

SECTION 1. The Massachusetts Employés' Insurance Association is hereby created a body corporate with the powers provided in this act, and with all the general corporate powers incident thereto.

SEC. 2. The governor shall appoint a board of directors of the association, consisting of fifteen members, who shall serve for a term of one year, or until their successors are elected by ballot by the subscribers at such time and for such term as the by-laws shall provide.

SEC. 3. Until the first meeting of the subscribers the board of directors shall have and exercise all the powers of the subscribers, and may adopt by-laws not inconsistent with the provisions of this act, which shall be in effect until amended or repealed by the subscribers.

SEC. 4. The board of directors shall annually choose by ballot a president, who shall be a member of the board, a secretary, a treasurer, and such other officers as the by-laws shall provide.

SEC. 5. Seven or more of the directors shall constitute a quorum for the transaction of business.

Vacancies in any office may be filled in such manner as the by-laws shall provide.

SEC. 6. Any employer in the commonwealth may become a subscriber.

SEC. 7. The board of directors shall, within thirty days of the subscription of twenty-five employers, call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his place of business not less than ten days before the date fixed for the meeting.

SEC. 8. In any meeting of the subscribers each subscriber shall be entitled to one vote, and if a subscriber has five hundred employés to whom the association is bound to pay

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compensation he shall be entitled to two votes, and he shall be entitled to one additional vote for each additional five hundred employés to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right or by the right of proxy, more than twenty votes.

SEC. 9. No policy shall be issued by the association until not less than one hundred employers have subscribed, who have not less than ten thousand employés to whom the association may be bound to pay compensation.

SEC. 10. No policy shall be issued until a list of the subscribers, with the number of employés of each, together with such other information as the insurance commissioner may require, shall have been filed at the insurance department, nor until the president and secretary of the association shall have certified under oath that every subscription in the list so filed is genuine and made with an agreement by every subscriber that he will take the policies subscribed for by him within thirty days of the granting of a license to the association by the insurance commissioner to issue policies.

SEC. 11. If the number of subscribers falls below one hundred, or the number of employés to whom the association may be bound to pay compensation falls below ten thousand, no further policies shall be issued until other employers have subscribed who, together with existing subscribers, amount to not less than one hundred who have not less than ten thousand employés, said subscriptions to be subject to the provisions contained in the preceding section.

SEC. 12. Upon the filing of the certificate provided for in the two preceding sections the insurance commissioner shall make such investigation as he may deem proper and, if his findings warrant it, grant a license to the association to issue policies.

SEC. 13. The board of directors shall distribute the subscribers into groups in accordance with the nature of the business and the degree of the risk of injury. Subscribers

within each group shall annually pay in cash, or notes absolutely payable, such premiums as may be required to pay the compensation herein provided for the injuries which may occur in that year.

SEC. 14. The association may in its by-laws and policies fix the contingent mutual liability of the subscribers for the payment of losses and expenses not provided for by its cash funds; but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium.

SEC. 15. If the association is not possessed of cash funds above its unearned premiums sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon the subscribers liable to assessment therefor in proportion to their several liability. Every subscriber shall pay his proportional part of any assessments which may be laid by the association, in accordance with law and his contract, on account of injuries sustained and expenses incurred while he is a subscriber.

SEC. 16. The board of directors may, from time to time, by vote fix and determine the amount to be paid as a dividend upon policies expiring during each year after retaining sufficient sums to pay all the compensation which may be payable on account of injuries sustained and expenses incurred. All premiums, assessments, and dividends shall be fixed by and for groups as heretofore provided in accordance with the experience of each group, but all the funds of the association and the contingent liability of all the subscribers shall be available for the payment of any claim against the association.

SEC. 17. Any proposed premium, assessment, dividend or distribution of subscribers shall be filed with the insurance department and shall not take effect until approved by the insurance commissioner after such investigation as he may deem necessary. (May withdraw approval. L. 1912, c. 666.)

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SEC. 18. The board of directors shall make and enforce reasonable rules and regulations for the prevention of injuries on the premises of subscribers, and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours. Any subscriber or employé aggrieved by any such rule or regulation may petition the industrial accident board for a review, and it may affirm, amend, or annul the rule or regulation.

SEC. 19. If any officer of the association shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury.

SEC. 20. Every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment to injured employés by the association.

SEC. 21. Every subscriber shall give notice in writing or print to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employés by the association. If an employer ceases to be a subscriber he shall, on or before the day on which his policy expires, give notice thereof in writing or print to all persons under contract with him. In case of the renewal of the policy no notice shall be required under the provisions of this act. He shall file a copy of said notice with the Industrial Accident Board. The notices required by this and the preceding section may be given in the manner therein provided or in such other manner as may be approved by the Industrial Accident Board.

SEC. 22. If a subscriber, who has complied with all the rules, regulations and demands of the association, is required by any judgment of a court of law to pay to an employé any damages on account of personal injury sustained by such employé during the period of subscription, the association shall pay to the subscriber the full amount of such judgment and the cost assessed therewith, if the subscriber shall have

given the association notice in writing of the bringing of the action upon which the judgment was recovered and an opportunity to appear and defend the same.

SEC. 23. The provisions of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven and of acts in amendment thereof shall apply to the association, so far as such provisions are pertinent and not in conflict with the provisions of this act, except that the corporate powers shall not expire because of failure to issue policies or make insurance.

SEC. 24. The board of directors appointed by the governor under the provisions of Part IV, section two, may incur such expenses in the performance of its duties as shall be approved by the governor and council. Such expenses shall be paid from the treasury of the commonwealth and shall not exceed in amount the sum of fifteen thousand dollars.

PART V

MISCELLANEOUS PROVISIONS

SECTION 1. If an employé of a subscriber files any claim with or accepts any payment from the association on account of personal injury, or makes any agreement, or submits any question to arbitration, under this act, such action shall constitute a release to the subscriber of all claims or demands at law, if any, arising from the injury.

SEC. 2. The following words and phrases, as used in this act, shall, unless a different meaning is plainly required by the context, have the following meaning:—"Employer" shall include the legal representative of a deceased employer. "Employé shall include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer. Any reference to an employé

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who has been injured shall, when the employé is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable. "Dependents" shall mean members of the employé's family or next of kin who were wholly or partly dependent upon the earnings of the employé for support at the time of the injury. "Average weekly wages" shall mean the earnings of the injured employé during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employé lost more than two weeks' time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employé has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district. "Association" shall mean the Massachusetts Employés Insurance Association. "Subscriber" shall mean an employer who has become a member of the association by paying a year's premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the insurance commissioner as provided in Part IV, section twelve.

SEC. 3. Any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by Part II of this act, and when such liability company issues a policy conditioned to pay

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such compensation the holder of such policy shall be regarded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to the provisions of Parts I, II, III and V and of section twenty-two of Part IV of this act, and shall file with the Insurance Department its classifications of risks and premiums relating thereto and any subsequent proposed classifications or premiums, none of which shall take effect until the Insurance Commissioner has approved the same as adequate for the risks to which they respectively apply.

SEC. 4. Sections one hundred and thirty-six to one hundred and thirty-nine, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine are hereby repealed.

SEC. 5. The provisions of this act shall not apply to injuries sustained prior to the taking effect thereof.

SEC. 6. Part IV of this act shall take effect on the first day of January, nineteen hundred and twelve; section one to three inclusive of Part III shall take effect on the tenth day of May, nineteen hundred and twelve; the remainder thereof shall take effect on the first day of July, nineteen hundred and twelve.

HOUSE OF REPRESENTATIVES.

July 28, 1911.

Passed to be enacted.

JOSEPH WALKER,
Speaker.

In Senate, July 28, 1911.

Passed to be enacted.

ALLEN T. TREADWAY,
President.

July 28, 1911.

Approved,
EUGENE N. FOSS.

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MICHIGAN

(L. 1912, No. 3)

An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employés, providing compensation for the accidental injury to or death of employés and methods for the payment of the same, establishing an industrial accident board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act.

The people of the State of Michigan enact:

PART I**MODIFICATION OF REMEDIES**

SECTION 1. In an action to recover damages for personal injury sustained by an employé in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense:

(a) That the employé was negligent, unless and except it shall appear that such negligence was willful;

(b) That the injury was caused by the negligence of a fellow employé;

(c) That the employé had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

SEC. 2. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by household domestic servants and farm laborers.

SEC. 3. The provisions of section one shall not apply to actions to recover damages for the death of, or for personal

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injuries sustained by employés of any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation in the manner and to the extent hereinafter provided.

SEC. 4. Any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation as hereinafter provided, shall not be subject to the provisions of section one; nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of or personal injury to any employé, for which death or injury compensation is recoverable under this act, except as to employés who have elected in the manner hereinafter provided not to become subject to the provisions of this act.

SEC. 5. The following shall constitute employers subject to the provisions of this act:

1. The State and each county, city, township, incorporated village and school district therein;

2. Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employé for which compensation under this act may be claimed, shall in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.

SEC. 6. Such election on the part of the employers mentioned in subdivision two of the preceding section, shall be made by filing with the industrial accident board hereinafter provided for, a written statement to the effect that such employer accepts the provisions of this act, and that he adopts, subject to the approval of said board, one of the four methods provided for the payment of the compensation

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hereinafter specified. The filing of such statement and the approval of said board shall operate, within the meaning of the preceding section, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least thirty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of this act: Provided, however, That such employer so electing to become subject to the provisions of this act shall, within ten days after the approval by said board of his election filed as aforesaid, post in a conspicuous place in his plant, shop, minor place of work, or if such employer be a transportation company, at its several stations and docks, notice in the form as prescribed and furnished by the industrial accident board to the effect that he accepts and will be bound by the provisions of this a

SEC. 7. The term "employé" as used in this act shall be construed to mean:

1. Every person in the service of the State, or of any county, city, township, incorporated village or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, township, incorporated village or school district therein: Provided, That one employed by a contractor who has contracted with a county, city, township, incorporated village, school district or the State, through its representatives, shall not be considered an employé of the State, county, city, township, incorporated village or school district which made the contract;

2. Every person in the service of another under any contract of hire, express or implied, oral or written, including

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aliens, and also including minors who are legally permitted to work under the laws of the State who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employés, but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer.

SEC. 8. Any employé as defined in subdivision one of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employé as defined in subdivision two of the preceding section shall be deemed to have accepted and shall be subject to the provisions of this act and of any act amendatory thereof if, at the time of the accident upon which liability is claimed:

1. The employer charged with such liability is subject to the provisions of this act, whether the employé has actual notice thereof or not; and

2. Such employé shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of this act; or, in the event that such contract of hire was made before such employer became subject to the provisions of this act, such employé shall have given to his employer notice in writing that he elects not to be subject to such provisions, or without giving either of such notices shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act. An employé who has given notice to his employer in writing as aforesaid that he elects not to be subject to the provisions of this act, may waive such claim by a notice in writing, which shall take effect five days after it is delivered to the employer or his agent.

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PART II

COMPENSATION

SECTION 1. If an employé who has not given notice of his election not to be subject to the provisions of this act, as provided in part one, section eight, or who has given such notice and has waived the same as hereinbefore provided, receives a personal injury arising out of and in the course of his employment by an employer who is at the time of such injury subject to the provisions of this act, he shall be paid compensation in the manner and to the extent hereinafter provided, or in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined.

SEC. 2. If the employé is injured by reason of his intentional and willful misconduct, he shall not receive compensation under the provisions of this act.

SEC. 3. No compensation shall be paid under this act for any injury which does not incapacitate the employé for a period of at least two weeks from earning full wages, but if incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury: Provided, However, That if such disability continues for eight weeks or longer, such compensation shall be computed from the date of the injury.

SEC. 4. During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed.

SEC. 5. If death results from the injury, the employer shall pay, or cause to be paid, subject, however, to the provisions of section twelve hereof, in one of the methods hereinafter provided, to the dependents of the employé, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one-half his average

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weekly wages, but not more than ten dollars nor less than four dollars a week for a period of three hundred weeks from the date of the injury. If the employé leaves dependents only partly dependent upon his earnings for support at the time of his injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employé to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employé before his death the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

SEC. 6. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employé:

(a) A wife upon a husband with whom she lives at the time of his death;

(b) A husband upon a wife with whom he lives at the time of her death;

(c) A child or children under the age of sixteen years (or over said age, if physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them

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according to the relative extent of their dependency. No person shall be considered a dependent, unless a member of the family of the deceased employé, or bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother or sister.

SEC. 7. Questions as to who constitute dependents and the extent of their dependency shall be determined, as of the date of the accident to the employé, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditons; and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto, or their legal guardians or trustees. In case of the death of one such dependent his proportion of such compensation shall be payable to the surviving dependents pro rata. Upon the death of all such dependents compensation shall cease. No person shall be excluded as a dependent who is a non-resident alien. No dependent of an injured employé shall be deemed, during the life of such employé, a party in interest to any proceeding by him for the enforcement of collection of any claim for compensation, nor as respects the compromise thereof by such employé.

SEC. 8. If the employé leaves no dependents the employer shall pay, or cause to be paid as hereinafter provided, the reasonable expense of his last sickness and burying, which shall not exceed two hundred dollars.

SEC. 9. While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employé a weekly compensation equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed four thousand dollars.

SEC. 10. While the incapacity for work resulting from the

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injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employé a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In cases included by the following schedule the disability in each such case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified therein, to-wit:

For the loss of a thumb, fifty per centum of the average weekly wages during sixty weeks;

For the loss of a first finger, commonly called index finger, fifty per centum of average weekly wages during thirty-five weeks;

For the loss of a second finger, fifty per centum of average weekly wages during thirty weeks;

For the loss of a third finger, fifty per centum of average weekly wages during twenty weeks;

For the loss of a fourth finger, commonly called little finger, fifty per centum of average weekly wages during fifteen weeks;

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one-half of such thumb, or finger, and compensation shall be one-half the amounts above specified;

The loss of more than one phalange shall be considered as the loss of the entire finger or thumb: Provided, however, That in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand;

For the loss of a great toe, fifty per centum of average weekly wages during thirty weeks;

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For the loss of one of the toes other than a great toe, fifty per centum of average weekly wages during ten weeks;

The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and compensation shall be one-half of the amount above specified;

The loss of more than one phalange shall be considered as the loss of the entire toe;

For the loss of a hand, fifty per centum of average weekly wages during one hundred and fifty weeks;

For the loss of an arm, fifty per centum of average weekly wages during two hundred weeks;

For the loss of a foot, fifty per centum of average weekly wages during one hundred and twenty-five weeks;

For the loss of a leg, fifty per centum of average weekly wages during one hundred and seventy-five weeks;

For the loss of an eye, fifty per centum of average weekly wages during one hundred weeks;

The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of section nine.

The amounts specified in this clause are all subject to the same limitations as to maximum and minimum as above stated.

SEC. 11. The term "average weekly wages" as used in this act is defined to be one fifty-second part of the average annual earnings of the employé. If the injured employé has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed. If the injured employé has not worked in such employment during substantially the whole of such

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immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employé of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed. In cases where the foregoing methods of arriving at the average annual earnings of the injured employé cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employé, and of other employés of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employé at the time of the accident in the employment in which he was working at such time. The fact that an employé has suffered a previous disability, or received compensation therefor, shall not preclude compensation for a later injury, or for death, but in determining compensation for the later injury, or death, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury in the employment in which he was working at such time, and shall be arrived at according to and subject to the limitations of the provisions of this section. The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employé computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.

SEC. 12. The death of the injured employé prior to the expiration of the period within which he would receive such

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weekly payments shall be deemed to end such disability, and all liability for the remainder of such payments which he would have received in case he had lived shall be terminated, but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:

If the injury so received by such employé was the proximate cause of his death, and such deceased employé leaves dependents, as hereinbefore specified, wholly or partially dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of this act to such deceased employé, to make the total compensation for the injury and death exclusive of medical and hospital services and medicines furnished as provided in section four hereof, equal to the full amount which such dependents would have been entitled to receive under the provisions of section five hereof in case the accident had resulted in immediate death, and such benefits shall be payable in weekly installments in the same manner and subject to the same terms and conditions in all respects as payments made under the provisions of said section five.

SEC. 13. No savings or insurance of the injured employé, nor any contribution made by him to any benefit fund or protective association independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than those paid or caused to be paid by the employer as herein provided, be considered in fixing the compensation under this act.

SEC. 14. If an injured employé is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege.

SEC. 15. No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employé, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

SEC. 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his dependents or by a person in their behalf.

SEC. 17. The notice shall be served upon the employer or an agent thereof. Such service may be made by delivering said notice to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

SEC. 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, was in fact misled thereby. Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury.

SEC. 19. After an employé has given notice of an injury, as provided by this act, and from time to time thereafter during the continuance of his disability, he shall, if so requested by the employer, or the insurance company carrying

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such risk, or the commissioner of insurance, as the case may be, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the State, furnished and paid for by the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be. The employé shall have the right to have a physician provided and paid for by himself present at the examination. If he refuses to submit himself for the examination, or in any way obstructs the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited. Any physician who shall make or be present at any such examination may be required to testify under oath as to the results thereof.

SEC. 20. No agreement by an employé to waive his rights to compensation under this act shall be valid.

SEC. 21. No payment under this act shall be assignable or subject to attachment or garnishment, or be held liable in any way for any debts. In case of insolvency every liability for compensation under this act shall constitute a first lien upon all the property of the employer liable therefor, paramount to all other claims or liens except for wages and taxes, and such liens shall be enforced by order of the court.

SEC. 22. Whenever any weekly payment has been continued for not less than six months, the liability therefor may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board, and said board may at any time direct in any case, if special circumstances be found which in its judgment require the same, that the deferred payments be commuted on the present worth thereof at five per cent per annum to one or more lump sum payments, and that such payments shall be made by the employer or the insurance company carrying such risk, or commissioner of insurance, as the case may be.

PART III

PROCEDURE

SECTION 1. There is hereby created a board which shall be known as the Industrial Accident Board, consisting of three members to be appointed by the governor, by and with the consent of the senate, one of whom shall be designated by the governor as chairman. Appointments to fill vacancies may be made during recesses of the senate, but shall be subject to confirmation by the senate at the next ensuing session of the legislature. The term of office of members of this board shall be six years, except that when first constituted one member shall be appointed for two years, one for four years, and one for six years. Thereafter one member shall be appointed every second year for the full term of six years. No more than two members of this board shall belong to the same political party.

SEC. 2. The salary of each of the members so appointed by the governor shall be three thousand five hundred dollars per year. The board may appoint a secretary at a salary of not more than two thousand five hundred dollars a year, and may remove him. The board shall be provided with an office in the capitol, or in some other suitable building in the city of Lansing, in which its records shall be kept, and it shall also be provided with necessary office furniture, stationery and other supplies. It shall provide itself with a seal for the authentication of its orders, awards and proceedings, upon which shall be inscribed the words "Industrial Accident Board—Michigan—Seal." It shall employ such assistants and clerical help as it may deem necessary and fix the compensation of all persons so employed: Provided, That the average compensation paid to such employé shall not exceed one thousand dollars per annum for each person employed, and all such clerical assistants shall be subject to existing laws regulating the grading and compen-

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sation of department clerks. The members of the board and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the board; but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board before payment is made.

All such salaries and expenses when audited and allowed by the board of state auditors, shall be paid by the state treasurer out of the general fund, upon warrant of the auditor general.

SEC. 3. The board may make rules not inconsistent with this act for carrying out the provisions of the act. Process and procedure under this act shall be as summary as reasonably may be. The board or any member thereof shall have the power to administer oaths, subpoena witnesses and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

SEC. 4. The board shall cause to be printed and furnish free of charge to any employer or employé such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of any employer who shall file a statement of election under this act, and the date of the filing thereof and its approval by such board, and a separate book in which shall be entered and indexed the name of every employer who shall file his notice of withdrawal of said election, and the date of the filing thereof; and books in which shall be recorded all orders and awards made by the board; and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause such notice of the fact to be given by requiring said employer to post such notice

as hereinbefore provided; and the board shall likewise cause notice to be given of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and notices of withdrawal of election, and of the time of the filing of the same, shall conclusively be imputed to all employés.

SEC. 5. If the employer, or the insurance company carrying such risk, or commissioner of insurance, as the case may be, and the injured employé reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the industrial accident board, and, if approved by it, shall be deemed final and binding upon the parties thereto. Such agreements shall be approved by said board only when the terms conform to the provisions of this act.

SEC. 6. If the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, and the employé fail to reach an agreement in regard to compensation under this act, either party may notify the industrial accident board, who shall thereupon call for the formation of a committee of arbitration. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board, and shall act as chairman. The other two members shall be named respectively by the two parties.

SEC. 7. It shall be the duty of the industrial accident board, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The board shall designate one of its members to act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, the board or any member thereof shall fill the vacancy and notify the parties to that effect.

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SEC. 8. The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the locality where the injury occurred, and the decision of the committee shall be filed with the industrial accident board. Unless a claim for a reivew is filed by either party within seven days, the decision shall stand as the decision of the industrial accident board: Provided, That said industrial accident board may, for sufficient cause shown, grant further time in which to claim such review.

SEC. 9. The industrial board or any member thereof may appoint a duly qualified impartial physician to examine the injured employé and to report. The fee for this service shall be five dollars and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases.

SEC. 10. The arbitrators named by or for the parties to the dispute shall each receive five dollars a day for his services, but the industrial accident board or any member thereof may allow additional reasonable amounts in extraordinary cases. The fees of such arbitrators and other costs of such arbitration, not exceeding, however, the taxable costs allowed in suits at law in the circuit courts of this State, shall be fixed by the board and paid by the State as the other expenses of the board are paid. The fees and the payment thereof of all attorneys and physicians for services under this act shall be subject to the approval of the industrial accident board.

SEC. 11. If a claim for review is filed, as provided in part three, section eight, the industrial accident board shall promptly review the decision of the committee of arbitration and such records as may have been kept of its hearings, and shall also if desired hear the parties, together with such additional evidence as they may wish to submit, and file its decision therein with the records of such proceedings.

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Such review and hearing may be held in its office at Lansing or elsewhere as the board shall deem advisable.

SEC. 12. The findings of fact made by said industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but the supreme court shall have power to review questions of law involved in any final decision or determination of said industrial accident board: Provided, That application is made by the aggrieved party within thirty days after such determination by certiorari, mandamus or by any other method permissible under the rules and practice of said court or the laws of this State, and to make such further orders in respect thereto as justice may require.

SEC. 13. Either party may present a certified copy of the decision of such industrial accident board approving agreements of settlement as provided in part three, section five hereof, or of the decision of such committee of arbitration when no claim for review is made as provided in part three, section eight, or of the decision of such industrial accident board when a claim for review is filed as provided in part three, section eleven, providing for payment of compensation under this act, to the circuit court for the county in which such accident occurred, whereupon said court shall, without notice, render a judgment in accordance therewith against said employer and also against any insurance company carrying such risk under the provisions of this act; which judgment, until and unless set aside shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed.

SEC. 14. Any weekly payment under this act may be reviewed by the industrial accident board at the request of the employer or the insurance company carrying such risks, or the commissioner of insurance as the case may be, or the employé; and on such review it may be ended, diminished

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or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action.

SEC. 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person.

SEC. 16. All questions arising under this act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the industrial accident board.

SEC. 17. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employés in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of his establishment or place of work, the name, age, sex and occupation of the injured employé, and shall state the time, the nature and cause of the injury, and such other information as may be required by the board. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense.

PART IV

METHOD OF PAYMENT

SECTION 1. Every employer filing his election to become subject to the provisions of this act, as hereinbefore set forth, shall have the right to specify at the time of doing so, subject to the approval of said industrial accident board, which of the following methods for the payment of such compensation he desires to adopt, to-wit:

First. Upon furnishing satisfactory proof to said board of his solvency and financial ability to pay the compensation and benefits hereinbefore provided for, to make such payments directly to his employés, as they may become entitled to receive the same under the terms and conditions of this act; or

Second. To insure against such liability in any employers' liability company authorized to take such risks in the State of Michigan; or

Third. To insure against such liability in any employers' insurance association organized under the laws of the State of Michigan; or

Fourth. To request the commissioner of insurance of the State of Michigan to assume the administration of the disbursement of such compensation exclusive of that provided for in part two, section four herein, and the collection of the premiums and assessments necessary to pay the same, as provided in part five hereof. Said board, however, shall have the right, from time to time to review and alter its decision in approving the election of such employer to adopt any one of the foregoing methods of payment, if in its judgment such action is necessary or desirable to secure and safeguard such payments to employés.

SEC. 2. Nothing herein shall affect any existing contract for employers' liability insurance or affect the organization

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of any mutual or other insurance company, or any arrangement now existing between employers and employés, providing for the payment to such employés, their families, dependents or representatives, sick, accident or death benefits, in addition to the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right to enforce in his own name in the manner provided in this act the liability of any insurance company or of any employers' association organized under the laws of the State of Michigan, or the commissioner of insurance, who may, in whole or in part, have insured the liability for such compensation: Provided, however, That payment in whole or in part of such compensation by either the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, shall, to the extent thereof be a bar to recovery against the other, of the amount so paid.

SEC. 3. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract for insurance, unless such company shall have been approved by the commissioner of insurance as provided by law.

SEC. 4. Any employer against whom liability may exist for compensation under this act may, with the approval of the industrial accident board, be relieved therefrom by:

1. Depositing the present value of the total unpaid compensation for which such liability exists, assuming interest at three per centum per annum, with such trust company of

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this State as shall be designated by the employé, or by his dependents, in case of his death, and such liability exists in their favor, or in default of such designation by him, or them, after ten days' notice in writing from the employer, with such trust company of this State as shall be designated by the industrial accident board; or

2. By the purchase of an annuity, within the limitation provided by law, in any insurance company granting annuities and licensed in this State, which may be designated by the employé, or his dependents, or the industrial accident board, as provided in subsection one of this section.

PART V

ADMINISTRATION BY COMMISSIONER OF INSURANCE

SECTION 1. Whenever five or more employers, who have become subject to the provisions of this act, and who have on their pay rolls an aggregate number of not less than three thousand employés, shall in writing request the commissioner of insurance so to do, he shall assume charge of levying and collection from such premium and dividends as may from time to time be necessary to pay the sums which shall become due their employés, or dependents of their employés, as compensation under the provisions of this act, and also the expense of conducting the administration of such funds; and shall disburse the same to the persons entitled to receive such compensation under the provisions of this act: Provided, however, That neither the commissioner of insurance nor the State of Michigan shall become or be liable or responsible for the payment of claims for compensation under the provisions of this act beyond the extent of the funds so collected and received by him as hereinafter provided.

SEC. 2. The commissioner of insurance shall immediately upon assuming the administration of the collection and disbursement of the moneys referred to in the preceding

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section, cause to be created in the state treasury a fund to be known as "accident fund." Each such employer shall contribute to this fund to the extent of such premiums or assessments as the commissioner shall deem necessary to pay the compensation accruing under this act to employ  s of such employers or to their dependents, which premiums and assessments shall be levied in the manner and proportion hereinafter set forth. The commissioner of insurance shall give a good and sufficient bond in the sum of twenty-five thousand dollars, executed by some surety company authorized to do business in the State of Michigan, covering the collection and disbursement of all moneys that may come into his hands under the provisions of this act. The premium on said bond shall be paid out of the general funds of the State on an order of the auditor general. Said bond must be approved by the board of state auditors.

SEC. 3. It is the intention that the amounts raised for such fund shall ultimately become neither more nor less than self-supporting, and the premiums or assessments levied for such purpose shall be subject to readjustment from time to time by the commissioner of insurance as may become necessary.

SEC. 4. The commissioner of insurance may classify the establishments or works of such employers in groups in accordance with the nature of the business in which they are engaged and the probable risk of injury to their employ  s under existing conditions. He shall determine the amount of the premiums or assessments which such employers shall pay to said accident fund, and may prescribe when and in what manner such premiums and assessments shall be paid, and may change the amount thereof both in respect to any or all of such employers from time to time, as circumstances may require, and the condition of their respective plants, establishments or places of work in respect to the safety of their employ  s may justify, but all such premiums or assess-

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ments shall be levied on a basis that shall be fair, equitable and just as among such employers. At the beginning of each fiscal year it shall be the duty of the commissioner of insurance to call for the required payment of premiums in such amounts as shall, together with any balance in the accident fund, in his judgment, and subject to the approval of said industrial accident board, be sufficient to enable him to pay all sums which may become due and payable to the employés of any such employer who has become subject to the provisions of part five of this act, and also the expenses of administering such funds during the following year.

SEC. 5. If any employer shall make default in the payment of any contribution, premium or assessment required as aforesaid by the commissioner of insurance, the sum due shall be collected by an action at law in the name of the State as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In case any injury happens to any of the workmen of such employer during the period of any default in the payment of any such premium, assessment or contribution, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman, or by his dependents in case death results from such accident, as if he had not elected to become subject to this act. In case, however, the amount actually collected in by such injured workman or his dependents shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of said accident fund. If the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section shall have the choice, to be exercised before suit, of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the

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employer shall be assigned to the State for the benefit of the accident fund.

SEC. 6. Any employer subject to the provisions of part five of this act, who has complied with all the rules, regulations and demands of the industrial accident board and the commissioner of insurance, may withdraw therefrom at the expiration of the period of one year for which he has elected to become subject to the provisions of this act: Provided, however, That he shall give written notice of such withdrawal to said commissioner of insurance at least thirty days before the expiration of such period: And Provided further, That if at the time of such withdrawal liability may exist against employer for compensation to employés who have been theretofore killed or injured, as hereinbefore provided, such employer shall either relieve himself and the commissioner of insurance from such liability in the manner provided in part four, section four of this act, or shall otherwise protect and indemnify said commissioner of insurance against such liability in such reasonable manner as he may require.

SEC. 7. In case any controversy shall arise between the commissioner of insurance and any employer subject to the provisions of part five of this act, relative to any rule or regulation adopted by said commissioner of insurance, or any decision made by him in respect to the collection, administration and disbursement of such funds, or in case any controversy shall arise between any employé claiming compensation under the provisions of this act and said commissioner of insurance, all such controversies of every kind and nature shall be subject to review in like manner and with the same force and effect in all respects as is heretofore provided in respect to differences arising through the administration of such funds by the employer, or by a liability insurance company or by an employers' mutual insurance association.

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SEC. 8. The books, records and pay rolls of each employer subject to the provisions of part five of this act shall always be open to inspection by the commissioner of insurance, or his duly authorized agent or representative, for the purpose of ascertaining the correctness of the amount of the pay roll reported, the number of men employed, and such other information as said commissioner may require in the administration of said funds. Refusal on the part of any such employer to submit said books, records and pay rolls for such inspection, shall subject the offending employer to a penalty of fifty dollars for each offense, to be collected by civil action in the name of the State and paid into the accident fund, and the individual who shall personally give such refusal shall be guilty of a misdemeanor.

SEC. 9. The commissioner of insurance shall issue proper receipts for all moneys so collected and received from employers, as aforesaid, shall take receipts for all sums paid to employes for compensation under the provisions of this act, and shall keep full and complete records of all business transacted by him in the administration of such funds. He may employ such deputies and assistants and clerical help as may be necessary, and as the board of state auditors may authorize, for the proper administration of said funds and the performance of the duties imposed upon him by the provisions of this act, at such compensation as may be fixed by said board of state auditors, and may also remove them. The commissioner of insurance and such deputies and assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the board, but all such salaries and expenses so authorized by the provisions of this act shall be charged to and paid out of said accident fund. He shall include in his annual report a full and correct statement of the administration of such fund, showing its financial status and outstanding obligations, the claims and the amount paid on each claim,

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claims not paid, claims contested and why, and general statistics in respect to all business transacted by him under the provisions of this act.

SEC. 10. Disbursements from said accident fund shall be made only upon warrants approved by the board of state auditors upon vouchers therefor transmitted to it by the commissioner of insurance. If at any time there shall not be sufficient money in said fund wherewith to pay the same, the employer on account of whose workmen it was that such warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid, with interest thereon at the legal rate, from the date of such payment to the date such next following contribution becomes payable, and if the amount of the credit shall exceed the amount of the contribution, he shall be repaid such excess.

SEC. 11. If this act shall be thereafter repealed, all moneys which are in the accident fund at the time of such repeal shall be subject to disposition under the direction of the circuit court for the county of Ingham, with due regard, however, to the obligation incurred and existing to pay compensation under the provisions of this act.

PART VI

MISCELLANEOUS PROVISIONS

SECTION 1. If the employé, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

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SEC. 2. If the provisions of this act relating to compensation for injuries to or death of workmen shall be repealed or adjudged invalid or unconstitutional, the period intervening between the occurrence of an injury or death and such repeal, or the final adjudication of invalidity, shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death, but the amount of any compensation which may have been paid for any such injury shall be deducted from any judgment for damages recovered on account of such injury.

SEC. 3. This act shall not affect any cause of action existing or pending before it went into effect.

SEC. 4. The provisions of this act shall apply to employers and workmen engaged in intrastate commerce, and also to those engaged in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this State, may, subject to the approval of the industrial accident board, and so far as not forbidden by any act of congress, voluntarily accept and become bound by the provisions of this act in like manner and with the same force and effect in all respects as is hereinbefore provided for other employers and their workmen.

SEC. 5. All acts or parts of acts inconsistent with this act are to be deemed replaced by this act, and to that end are hereby repealed.

SEC. 6. The legislature intends that part five of this act shall be deemed separate from the other parts thereof, so that if said part five should fail or be adjudged invalid or unconstitutional it shall in no way affect any other part of this act.

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SEC. 7. To carry out the provisions of this act there is hereby appropriated for the expenses of the industrial accident board for the fiscal year ending June thirtieth, nineteen hundred thirteen, and annually thereafter, the sum of twenty-five thousand dollars. The auditor general shall add to and incorporate into the state tax the sum of twenty-five thousand dollars annually, which said sum shall be included in the state taxes apportioned by the auditor general on all taxable property of the State, to be levied, assessed and collected as other state taxes, and when so assessed and collected to be paid into the general fund to reimburse said fund for the appropriation made by this act.

SEC. 8. The provisions of this act shall take effect and be in force from and after September first, nineteen hundred twelve.

Approved March 20, 1912.

ACT AUTHORIZING FORMATION OF MUTUAL LIABILITY INSURANCE COMPANIES

An act to authorize the formation of mutual insurance companies whose members may be composed of persons, firms, partnership associations or corporations who have elected to come under the law relating to employers' liability and workmen's compensation.

The People of the State of Michigan enact:

SECTION 1. Any number of persons, firms, partnership associations or corporations, not less than five, who have become subject to the provisions of the laws of Michigan relating to employers' liability and workmen's compensation, and who own or operate mills, factories, manufacturing establishments of any and every kind, buildings, stores, hotels and mercantile establishments, or any combination of manufacturing and mercantile business, mines, quarries, blast furnaces, railroads and transportation companies, tel-

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egraph and telephone companies, or who are engaged in the production or supplying of gas and electricity for lighting, fuel, power, or other purposes; printing, publishing and book-making, or in carrying on any other lawful business in the State of Michigan, may, subject to the approval of the industrial accident board of Michigan, associate together and form an incorporated company for the purpose of mutual insurance of its members against liability for any and all payments which may become due and payable to their employés under the provisions of law for death benefits, disability benefits, or otherwise, as hereinbefore set forth: Provided, however, That the persons, firms or corporations so associating themselves together for the organization of such company shall have on their pay rolls at that time not less than five thousand employés: And Provided further, That the industrial accident board of Michigan may in its discretion limit the employers forming or joining in the organization of any such company to those engaged in industrial operations of the same general character, or in operations in which the risks and hazards incurred by their employés are more or less similar in nature and extent.

SEC. 2. Such employers so associating shall prepare in triplicate articles of association as hereinafter specified, which shall first be submitted to the industrial accident board and the commissioner of insurance for their approval, and when approved, one copy thereof shall be filed in the office of the commissioner of insurance, one copy in the office of the secretary of state and the other copy with the county clerk in the county where the principal office of such company will be maintained. Such articles of association shall be signed by all the incorporators, and shall be acknowledged by them, or by their duly authorized officers or agents, before some officer of the State duly authorized to take acknowledgment of deeds.

SEC. 3. Such articles of association shall set forth:

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First. The names of the persons, firms, partnership associations and corporations associating in the first instance, their respective residences, the nature of the business in which they are engaged, and the number of persons employed therein by each of them;

Second. That each and all of such incorporators have elected, with the approval of the industrial accident board, to become subject to the provisions of this act, and are forming this corporation for the purpose of mutually insuring their members against liability for any and all payments which may become due and payable to their employés under the provisions of this act;

Third. The name by which such corporation shall be known;

Fourth. The period for which the company is incorporated, which shall not exceed thirty years;

Fifth. The number of directors, which shall be not less than five, nor more than fifteen, and the names of the directors for the first year;

Sixth. The place where the office of the company shall be located, which shall be within the State of Michigan.

SEC. 4. Any company formed under this act shall be deemed a body corporate and politic in fact and in name, and shall be subject to all the provisions of the statutes in relation to corporations, so far as they are applicable.

SEC. 5. The incorporators of any company organized under this act shall have power to make such by-laws not inconsistent with the constitution or laws of this State, as may be deemed necessary for the government of its officers and members, and the conduct of its affairs, the admission of new members and regulations governing the assessment and collection of premiums and assessments; but such by-laws shall not become operative until a true copy thereof shall have been filed with and approved by the industrial accident board.

SEC. 6. Upon the approval of the articles of association of

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such company by the industrial accident board and the commissioner of insurance, and upon filing the same with the commissioner of insurance, with the secretary of state and with the county clerk of the county where the principal office of said company will be kept, the commissioner of insurance shall grant a license to such company to issue policies.

SEC. 7. The board of directors shall determine the amount of the premiums of assessments which the members of such company shall pay for such insurance, in accordance with the nature of the business in which they are engaged, and the probable risk of injury to their employés under existing conditions. The board may also prescribe when and in what manner such premiums shall be paid, and may change the amount thereof both in respect to any or all of its members from time to time, as circumstances may require and the conditions of their respective plants, establishments or places of work in respect to the safety of their employés may justify, but all such premiums or assessments shall be levied on a basis that shall be fair, equitable and just as among such members; and it shall be the duty of such board of directors at the beginning of each fiscal year, to call for the required payment of premiums in such amount as shall, in the judgment of said industrial accident board, be sufficient to enable such company to pay all sums which may become due and payable during the following year, to the employés or any of its members under the provisions of this act, and also the expenses of conducting its business.

SEC. 8. The company shall in its by-laws and policies fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by its cash funds. Such contingent liability of a member shall not be less than an amount equal to the liability imposed by this act and of the act to provide compensation for the accidental injury or death of employés.

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SEC. 9. If the company is not possessed of cash funds so that it has unearned premiums for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon the members liable to assessment therefor in proportion to their several liability. Every member shall pay his proportional part of any assessment which may be laid by the board of directors, in accordance with the law and his contract, on account of injuries sustained and expenses incurred while he is a member of such company.

SEC. 10. The board of directors may, from time to time, by vote, fix and determine the amount to be paid as a dividend upon policies expiring during each year after retaining sufficient sums to pay all the compensation which may be payable on account of injuries sustained and expenses incurred. All premiums, assessments and dividends shall be fixed and determined in accordance with the experience of said company, but all the funds of the company, and the contingent liability of all the members thereof, shall be available for the payment of any claim against the company.

SEC. 11. Any proposed premium or assessment required of, or any dividend or distribution made to the members, shall be filed with the industrial accident board, and shall not take effect until approved by said board after such investigation as it may deem necessary.

SEC. 12. The board of directors may make and enforce reasonable rules and regulations, not in conflict with the laws of this State, for the prevention of injuries on the premises of members, and for this purpose the inspectors of the company shall have free access to all such premises during regular working hours. Any member neglecting to provide suitable safety appliances as provided by law or as required by the board of directors may be expelled by a majority vote of all the members. Any member, or employé

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of any member, aggrieved by any such rule or regulation, may petition the industrial accident board for review, and it may affirm, amend or annul the rule or regulation.

SEC. 13. Any member of said company, who has complied with all its rules, regulations and demands, may withdraw therefrom at the expiration of the period of one year for which he has elected to become subject to the provisions of this act: Provided, however, That he shall give written notice of such withdrawal to said company at least thirty days before the expiration of such period: And Provided further, That if at the time of such withdrawal liability may exist against such member and against said company for compensation to employés who have been theretofore killed or injured as hereinbefore provided, such member shall either relieve himself and said company from such liability in the manner provided in part four, section four of this act, or shall otherwise protect and indemnify said company against such liability in such reasonable manner as may be required by the board of directors.

SEC. 14. The business year of every company organized, existing or doing business in this State, under and by virtue of the provisions of this act, shall close on the thirty-first day of December in each year, and every such company shall within sixty days thereafter prepare, under oath of its president and secretary, and file in the office of the commissioner of insurance of this State, and also with said industrial accident board, a detailed statement showing its assets and how invested, liabilities, receipts from premiums and all other sources, an itemized account of all expenditures, salaries of officers, number of policies or certificates in force, amount insured thereby, claims paid, and amount paid on each claim, claims reported but not paid, claims contested and why, and shall answer such other questions as the commissioner of insurance, who shall furnish blanks for that purpose, may require, in order to ascertain its true

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financial condition. The commissioner shall publish such annual statements in detail in his annual report.

SEC. 15. If any officer of the company shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury.

SEC. 16. Any such company formed under this act shall have power to amend its articles of association and by-laws at its regular annual meeting or at special meetings called and held as provided in its by-laws, but said amendments shall, before they become operative, be approved and filed in the same manner as the original articles and by-laws.

SEC. 17. Any such company formed under this act shall have power to own, hold and acquire such real and personal property as shall be necessary for the transaction of its business.

SEC. 18. Any company formed under this act may sue and be sued in any court of law or equity, with the same rights and obligations as a natural person, and in addition to the powers hereinbefore enumerated, shall possess and exercise all such rights and powers as are necessarily incidental to the exercise of the powers expressly granted herein.

Approved March 20, 1912.

NEVADA

(L. 1911, c. 183)

An act determining certain employments and industries to be especially dangerous, establishing a system of compensation for accidents to workmen engaged therein, requiring employers or contractors carrying on such industries to pay compensation, entitling injured workmen or their legal representatives to receive such compensation, fixing the amount of same and the manner of payment, fixing the time within which claims for compensation must be made,

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prescribing the manner and method of giving notice to such owner or contractor of such accident, providing for the manner of settling disputed claims by arbitration, providing for their final determination by courts of justice, and granting to courts of justice certain additional powers in proceedings under this act, determining what persons shall be liable under this act.

Approved March 24, 1911.

The people of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. If in any employment to which this act applies personal injury disabling a workman from his regular service for more than ten days, or death by accident, arising out of and in the course of employment is caused to a workman, the workman so injured, or in case of death, the member of his family, as hereinafter defined, shall be entitled to receive from his employer, and the said employer shall be liable to pay, the compensation provided for in this act; *provided*, that recovery hereunder shall not be barred where such employé may have been guilty of contributory negligence where such contributory negligence is slight and that of the employer is gross in comparison, but in which event the compensation may be diminished in proportion to the amount of negligence attributable to such employé, and it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury; and it shall not be a defense: (1) That the employé either expressly or impliedly assumed the risk of the hazard complained of; (2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant. No contract, rule or regulation shall exempt the employer from any of the provisions of the preceding section of this act.

SEC. 2. "Employer" includes any body of persons cor-

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porate or incorporate and the legal personal representative of a deceased employer. "Workman" includes every person who is engaged in an employment to which this act applies, whether by way of manual labor or otherwise, and where his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependents or other person to whom compensation is payable. "Dependents" means wife, father, mother, husband, sister, brother, child or grandchild; *provided*, that they were wholly or partly dependent upon the earnings of the workman at the time of his death.

SEC. 3. This act shall apply to workmen engaged in manual or mechanical labor in the following employments within this State, each of which is hereby determined to be especially dangerous, in which from the nature, condition or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessarily or substantially unavoidable, and to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

(a) The erection or demolition of any bridge or building in which there is, or in which the plans or specifications require iron or steel framework;

(b) The operation of elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge or building for the conveying of material in connection with the erection or demolition of such bridge or building;

(c) Work on scaffolds of any kind elevated twenty feet or more above the ground, water or floor beneath, in the erection, construction, painting, alteration or repair of buildings, bridges or structures;

(d) Construction, operation, alteration, or repair of wires,

cables, switchboards or apparatus charged with electric current;

(e) The operation on railroads of locomotives, engines, trains, motors or cars propelled by gravity, steam, electricity or other mechanical power, or the construction or repairs of railroad tracks and roadbeds over which such locomotives, engines, trains, motors, or cars are operated;

(f) Construction, operation, alteration, or repairs of locomotives, engines, trains, motors or cars in or about the shops, round-houses, or other places, where the same is done;

(g) Construction, operation, alteration or repairs to mills, smelters or mines, including every shaft or pit in the course of being sunk, and every crosscut, drift, station, winze, level or inclined planes through which workmen pass to and from work, and all works, machinery, tramways, ladders or passages, both below ground and above ground, in and adjacent to any mine;

(h) All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry;

(i) The construction of tunnels.

The employers to whom this act shall apply shall be any person or persons, association, such industry as aforesaid.

SEC. 4. Notice of accidents must be given partnership or corporation carrying on any to the employer as soon as practicable after the happening thereof, and the claim for compensation with respect to such accident within six months from the occurrence of such accident causing the injury, or in case of death, within six months from the time of death; *provided, always*, that the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defense by the want, defect or inaccuracy, and that such want, defect or inaccuracy was occasioned by mistake or other reasonable

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cause. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury, if known, the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. The notice may be served by delivering the same to or at the residence or place of business of the person upon whom it is to be served, or the notice may also be served by post, by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered. Where the employer is a body of persons, natural or artificial, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at the office, or, if there be more than one office, any one of the offices of such body.

SEC. 5. The amount of compensation in case death results from injury, or for death accruing within five years as a result of injury, shall be:

(a) If the workman leave any person or persons who at the time of the accident were wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of two thousand dollars, whichever of these sums is the greater, but not exceeding in any case three thousand dollars; *provided*, that the total sum of any weekly payments made under this act shall be deducted from such sum; and if the period of the workman's employment by the same employer has been less than the said three years, then the amount of his earnings during the said three years shall be

deemed to be nine hundred and thirty-six times his average daily earnings during the period of his actual employment under the same employer;

(b) If the workman leave only person or persons who at the time of the accident were partly dependent upon his earnings, a sum equal to 50 per cent of the amount payable under the foregoing provisions of this section;

(c) If the workman leave no person at the time of the accident who was dependent upon his earnings, the reasonable expenses of his medical attendance and burial, not exceeding in all three hundred dollars.

Whatever sum is payable under this section in case of death of the injured workman shall be paid to his legal representatives for the benefit of such dependents, and if he leaves no such dependents, then to the public administrator, for the benefit of the person or persons to whom the expenses of medical attendance and burial are due.

SEC. 6. The amount of compensation in case of total or partial disability resulting from injury shall be:

(a) A weekly payment during the disability, beginning within ten days after the injury, 60 per cent of his average weekly earnings in such employment during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, so long as there is complete disability; and that proportion of the said percentage which the depleted earning capacity for that service bears to the total disability when the injury is only partial, but in no event shall the total of all payments under this act exceed the sum of three thousand dollars;

(b) In addition to the foregoing payments, if the injured person lose both feet or both hands, or one foot and one hand, or both eyes or one eye and one foot or one hand, he shall receive, during a full period of five years, 40 per cent of his average weekly earnings, or if he lose one foot, one hand or

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one eye, the additional compensation therefor shall be 15 per cent of his average weekly earnings, the amount of such earnings to be computed in the same manner as the foregoing 60 per cent; *provided*, that in no case shall all the payments received herein exceed in any month the whole wages earned when the injury occurs, nor shall the added percentages continue longer than to make all payments aggregate three thousand dollars.

SEC. 7. Any workman entitled to receive weekly payments under this act is required, if requested by the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within three weeks after the injury, and thereafter at intervals not oftener than once in six weeks. A copy of the report of the examining physician shall be furnished to the workman. If a dispute then exists as to the workman's condition or amount of weekly compensation such dispute shall be determined by arbitration under this act, or by judicial procedure as hereinafter provided; *provided, also*, that any and all disputes arising under this act may be first submitted to a board of arbitration, and in case of failure to settle it, resort may be had to courts of justice.

SEC. 8. Arbitration proceedings shall be as follows: The employer and the workman may each choose one arbitrator, the two arbitrators thus chosen shall choose a third, and the three arbitrators shall hear the facts of the dispute within three months after having been chosen, and within two weeks thereafter, render a decision, which, if unanimous, shall be final and binding on both parties.

SEC. 9. On failure of the board of arbitration to reach an adjustment of the dispute above referred to, either party may apply to a court of competent jurisdiction, and have an adjudication as in any other controversy. And the findings and judgment of the court shall be conclusive on all parties

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concerned. Said courts may compel the attendance of witnesses and the production of evidence, as in all other cases, provided for by law, and the judgment of said court may continue and diminish or increase the weekly payments, subject to the maximum provided in this act. The prevailing party in any action, brought under the provisions of this act, shall be entitled to his costs of suit and reasonable attorney's fees; *provided*, that nothing in this act shall operate to defeat the constitutional right of appeal.

SEC. 10. If any employer who shall be the principal, enters into a contract with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, the said principal shall be liable to pay to any workman employed in the execution of the work, any compensation under this act, which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from the principal, then reference to the principal shall be substituted for reference to the employer, except the amount of compensation shall be calculated with reference to the earnings of the workman under the contractor or employer by whom he is immediately employed. Where such principal is liable to pay compensation he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section. Nothing in this section shall be construed as preventing a workman from recovering compensation under this act, from the contractor or subcontractor, instead of the principal; nor shall this section apply in any case where the accident shall occur elsewhere than on or in or about the premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

SEC. 11. Nothing in this act contained shall be held or

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deemed to require any workman or his personal representatives to proceed under its terms and provisions for the recovery of compensation of damages for death or accidental injury. But if the workman or his personal representatives shall so elect, he or they may disregard the provisions of this act and may pursue any other remedy at law for the recovery of such compensation of damages for or on account of such death or injury. The right of election or choice of remedies shall be exercised solely by such workman or his representatives.

SEC. 12. A claim for compensation for the injury or death of any employé or any reward or judgment entered thereon shall be entitled to a preference over the other debts of the employer if and to the same extent as the wages of such employé shall be so preferred, but this section shall not impair the lien of any judgment entered upon any award.

SEC. 13. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment of any assignable cause of action in tort which the employé or his personal representative may have against any other party for such injury or death, and such employer may enforce in his own name the liability of such other party.

SEC. 14. Nothing in this act contained shall be construed as impairing the right of parties interested after the injury or death of an employé to compromise or settle upon such terms as they may agree upon any liability which may be claimed to exist under this act on account of such injury or death, nor as conferring upon the dependents of any injured employé any interest which he may not divert by such settlement or for which he or his estate shall in the event of such settlement by him be accountable to such dependents or any of them.

SEC. 15. This act shall take effect July 1, 1911.

NEW HAMPSHIRE

(L. 1911, c. 163)

AN ACT in Relation to Employers' Liability and Workmen's Compensation

SECTION 1. This act shall apply only to workmen engaged in manual or mechanical labor in the employments described in this section, which, from the nature, conditions or means of prosecution of such work, are dangerous to the life and limb of workmen engaged therein, because in them the risks of employment and the danger of injury caused by fellow servants are great and difficult to avoid. (a) The operation on steam or electric railroads of locomotives, engines, trains or cars, or the construction, alteration, maintenance or repair of steam railroad tracks or roadbeds over which such locomotives, engines, trains or cars are or are to be operated. (b) Work in any shop, mill, factory or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor. (c) The construction, operation, alteration or repair of wires or lines of wires, cables, switch-boards or apparatus, charged with electric currents. (d) All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite or any other explosives, where the same are used as instrumentalities of the industry, or to any steam boiler owned or operated by the employer, *provided* injury is occasioned by the explosion of any such boiler or explosive. (e) Work in or about any quarry, mine or foundry. As to each of said employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

SEC. 2. If, in the course of any of the employments above

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described, personal injury by accident arising out of and in the course of the employment is caused to any workman employed therein, in whole or in part, by failure of the employer to comply with any statute, or with any order made under authority of law, or by the negligence of the employer or any of his or its officers, agents or employes, or by reason of any defect or insufficiency due to his, its or their negligence in the condition of his or its plant, ways, works, machinery, cars, engines, equipment, or appliances, then such employer shall be liable to such workman for all damages occasioned to him, or, in case of his death, to his personal representatives for all damages now recoverable under the provisions of chapter 191 of the Public Statutes. The workman shall not be held to have assumed the risk of any injury due to any cause specified in this section; but there shall be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed. The damages provided for by this section shall be recovered in an action on the case for negligence.

SEC. 3. The provisions of section 2 of this act shall not apply to any employer who shall have filed with the commissioner of labor his declaration in writing that he accepts the provisions of this act as contained in the succeeding sections, and shall have satisfied the commissioner of labor of his financial ability to comply with its provisions, or shall have filed with the commissioner of labor a bond, in such form and amount as the commissioner may prescribe, conditioned on the discharge by such employer of all liability incurred under this act. Such bond shall be enforced by the commissioner of labor for the benefit of all persons to whom such employer may become liable under this act in the same manner as probate bonds are enforced. The commissioner may, from time to time, order the filing of new bonds, when in his judgment such bonds are necessary; and after thirty

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days from the communication of such order to any employer, such employer shall be subject to the provisions of section 2 of this act until such order has been complied with. The employer may at any time revoke his acceptance of the provisions of the succeeding sections of this act by filing with the commissioner of labor a declaration to that effect, and by posting copies of such declaration in conspicuous places about the place where his workmen are employed. Any person aggrieved by any decision of the commissioner under this section may apply by petition to any justice of the superior court for a review of such decision and said justice on notice and hearing shall make such order affirming, reversing or modifying such decision as justice may require; and such order shall be final. Such employer shall be liable to all workmen engaged in any of the employments specified in section 1, for any injury arising out of and in the course of their employment, in the manner provided in the following sections of this act. *Provided*, that the employer shall not be liable in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed, and, *provided*, that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the intoxication, violation of law, or serious or willful misconduct of the workman. *Provided, further*, that the employer shall at the election of the workman, or his personal representative, be liable under the provisions of section 2 of this act for all injury caused in whole or in part by willful failure of the employer to comply with any statute, or with any order made under authority of law.

SEC. 4. The right of action for damages caused by any such injury, at common law, or under any statute in force on January one, nineteen hundred and eleven, shall not be affected by this act, but in case the injured workman, or in event of his death his executor or administrator, shall avail

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himself of this act, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury. In case after such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law or under any statute other than this act against the employer therefor, he shall be barred from all benefit of this act in regard thereto.

SEC. 5. No proceeding for compensation under this act shall be maintained unless notice of the accident as hereinafter provided has been given to the employer as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured and during such disability, and unless claim for compensation has been made within six months from the occurrence of the accident, or in case of the death of the workman, or in the event of his physical or mental incapacity within six months after such death or the removal of such physical or mental incapacity, or in the event that weekly payments have been made under this article, within six months after such payments have ceased, but no want or defect or inaccuracy of a notice shall be a bar to the maintenance of proceedings unless the employer proves that he is prejudiced by such want, defect or inaccuracy. Notice of the accident shall apprise the employer of the claim for compensation under this article, and shall state the name and address of the workman injured, and the date and place of the accident. The notice may be served personally or by sending it by mail in a registered letter addressed to the employer at his last known residence or place of business.

SEC. 6. (1) The amount of compensation shall be, in case death results from injury: (a) If the workman leaves any widow, children or parents, resident of this State, at the time

of his death, then wholly dependent on his earnings, a sum to compensate them for loss, equal to one hundred and fifty times the average weekly earnings of such workman when at work on full time during the preceding year during which he shall have been in the employ of the same employer, or if he shall have been in the employment of the same employer for less than a year then one hundred and fifty times his average weekly earnings on full time for such less period. But in no event shall such sum exceed three thousand dollars. Any weekly payments made under this act shall be deducted from the sum so fixed. (b) If such widow, children or parents at the time of his death are in part only dependent upon his earnings, such proportion of the benefits provided for those wholly dependent as the amount of the wage contributed by the deceased to such partial dependents at the time of injury bore to the total wage of the deceased. (c) If he leaves no such dependents, the reasonable expenses of his medical attendance and burial, not exceeding one hundred dollars. Whatever sum may be determined to be payable under this act in case of death of the injured workman shall be paid to his legal representative for the benefit of such dependents, or if he leaves no such dependents, for the benefit of the persons to whom the expenses of medical attendance and burial are due.

(2) Where total or partial incapacity for work at any gainful employment results to the workman from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity, subject as herein provided, not exceeding fifty per centum of his average weekly earnings when at work on full time during the preceding year during which he shall have been in the employment of the same employer, or if he shall have been in the employment of the same employer for less than a year, then a weekly payment of not exceeding one-half the average weekly earnings on full time for such less period. In fixing

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the amount of the weekly payment, regard shall be had to the difference between the amount of the average earnings of the workman before the accident and the average amount he is able to earn thereafter as wages in the same employment or otherwise. In fixing the amount of the weekly payment, regard shall be had to any payment, allowance or benefit which the workman may have received from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in the same employment or otherwise after the accident, but shall amount to one-half of such difference. In no event shall any compensation paid under this act exceed the damage suffered, nor shall any weekly payment payable under this act in any event exceed ten dollars a week or extend over more than three hundred weeks from the date of the accident. Such payment shall continue for such period of three hundred weeks *provided* total or partial disability continue during such period. No such payment shall be due or payable for any time prior to the giving of the notice required by section 5 of this act.

SEC. 7. Any workman entitled to receive weekly payments under this act is required, if requested by the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within two weeks after the injury, and thereafter at intervals not oftener than once in a week. If the workman refuses to submit to such examination, or obstructs the same, his right to weekly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

SEC. 8. In case an injured workman shall be mentally in-

competent at the time when any right or privilege accrues to him under this act, the guardian of the incompetent appointed pursuant to law may, on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the workman himself had been competent and had claimed or exercised any such right or privilege, and no limitation of time in this act provided for shall run so long as said incompetent workman has no guardian.

SEC. 9. Any question as to compensation which may arise under this act shall be determined by agreement or by an action at equity, as hereinafter provided. In case the employer fail to make compensation as herein provided, the injured workman, or his guardian, if such be appointed, or his executor or administrator, may then bring an action to recover compensation under this act in any court having jurisdiction of an action for recovery of damages for negligence for the same injury between the same parties. Such action shall be by petition in equity, which may be made returnable at the appropriate term of the Superior Court or may be filed in the office of the clerk of the Superior Court and presented in term time or vacation to any justice of said court, who on reasonable notice shall hear the parties and render judgment thereon. The judgment in such action if in favor of the plaintiff shall be for a lump sum equal to the amount of payments then due and prospectively due under this act. In such action by an executor or administrator the judgment may provide the proportions of the award or the costs to be distributed to or between the several dependents. If such determination is not made it shall be determined by the Probate Court in which such executor or administrator is appointed, in accordance with this act, on petition of any party interested, on such notice as such court may direct. Any employer who has declared his intention to act under the compensation features of this act shall also have the right to

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apply by similar proceedings to the Superior Court or to any justice thereof for a determination of the amount of the weekly payments to be paid the injured workman, or of a lump sum to be paid the injured workman in lieu of such weekly payments; and either such employer or workman may apply to said Superior Court or to any justice thereof in similar proceeding for the determination of any other question that may arise under the compensation feature of this act; and said court or justice, after reasonable notice and hearing, may make such order as to the matter in dispute and taxable costs as justice may require.

SEC. 10. Any person entitled to weekly payments under this act against any employer shall have the same preferential claim therefor against the assets of the employer as is allowed by law for a claim by such person against such employer for unpaid wages or personal services. Weekly payments due under this act shall not be assignable or subject to levy, execution, attachment or satisfaction of debts. Any right to receive compensation under this act shall be extinguished by the death of the person entitled thereto.

SEC. 11. No claim of any attorney-at-law for any contingent interest in any recovery under this act for services in securing such recovery or for disbursements shall be an enforceable lien on such recovery, unless the account of the same be approved in writing by a justice of the Superior Court or, in case the same be tried in any court, by the justice presiding at such trial.

SEC. 12. Every employer subject to the provisions of this act, shall from time to time make to the commissioner of labor such returns as to its operation as said commissioner may require upon blanks to be furnished by said commissioner. Any employer failing to make such returns when required by said commissioner shall, until such returns are made, be subject to the provisions of section 2 of this act.

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SEC. 13. This act shall take effect January first, nineteen hundred and twelve.

Approved April 15, 1911.

NEW JERSEY

(L. 1911, c. 95)

An Act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

COMPENSATION BY ACTION AT LAW

SECTION I, 1. *Employé entitled to compensation for accidental injury. Fact determined by jury.* When personal injury is caused to an employé by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employé was himself not willfully negligent at the time of receiving such injury, and the question of whether the employé was willfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.

2. *Certain pleas abolished.* The right to compensation as provided by section I, 1 of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employé; or that the injured employé assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer

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to provide and maintain safe premises and suitable appliances; which said grounds of defense are hereby abolished.

3. *Contract not to bar liability.* If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract, written or verbal, with a subcontractor to do all or any part of such work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer under this act for injury caused to an employé of such contractor or subcontractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and remedied through the negligence of the employer or some one intrusted by him with the duty of seeing that they were in proper condition. This paragraph shall apply only to actions arising under section I.

4. *Application of act in case of death.* The provisions of paragraphs one, two and three shall apply to any claim for the death of an employé arising under an act entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," approved March third, eighteen hundred and forty-eight, and the amendments thereof and supplements thereto.

5. *Burden of proof on defendant.* In all actions at law brought pursuant to section I of this act, the burden of proof to establish willful negligence in the injured employé shall be upon the defendant.

6. *Claim against compensation. Proviso.* No claim for legal services or disbursements pertaining to any demand made or suit brought under the provisions of this act shall be an enforceable lien against the amount paid as compensation, unless the same be approved in writing by the judge or justice presiding at the trial, or in case of settlement without trial, by the judge of the Circuit Court of the district in which such issue arose; *provided*, that if notice in writing be

given the defendant of such claim for legal services or disbursements, the same shall be a lien against the amount paid as compensation, subject to determination of the amount and approval hereinbefore provided.

ELECTIVE COMPENSATION

SEC. II, 7. *Compensation under agreement. Exceptions.* When employer and employé shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employé by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employé, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.

8. *Agreement deemed surrender of rights to other method.* Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of section II of this act, and shall bind the employé himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

9. *Employment subject to this act.* Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the pro-

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visions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby. In the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

10. *Termination of contract.* The contract for the operation of the provisions of section II of this act may be terminated by either party upon sixty days' notice in writing prior to any accident.

11. Following is the schedule of compensation:

(a) *Schedule of payments. Temporary disability. Proviso.* For injury producing temporary disability, fifty per centum of the wages received at the time of injury, subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; *provided*, that if at the time of injury the employé receives wages of less than five dollars per week, then he shall receive the full amount of such wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(b) *Complete disability. Proviso.* For disability total in character and permanent in quality, fifty per centum of the wages received at the time of injury, subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; *provided*, that if at the time of injury the employé receives wages of less than five dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.

(c) *Partial disability.* For disability partial in character but permanent in quality, the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit:

Thumb. For the loss of a thumb, fifty per centum of daily wages during sixty weeks.

First finger. For the loss of a first finger, commonly called index finger, fifty per centum of daily wages during thirty-five weeks.

Second finger. For the loss of a second finger, fifty per centum of daily wages during thirty weeks.

Third finger. For the loss of a third finger, fifty per centum of daily wages during twenty weeks.

Fourth finger. For the loss of a fourth finger, commonly called little finger, fifty per centum of daily wages during fifteen weeks.

Phalange. The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one-half of such thumb, or finger, and compensation shall be one-half the amounts above specified.

More than one phalange. Proviso. The loss of more than one phalange shall be considered as the loss of the entire finger or thumb; *providing, however*, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, fifty per centum of daily wages during thirty weeks.

Other toes. For the loss of one of the toes other than a great toe, fifty per centum of daily wages during ten weeks.

Phalange of toe. For the loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and compensation shall be one-half of the amount above specified.

More than one phalange. The loss of more than one phalange shall be considered as the loss of the entire toe.

Hand. For the loss of a hand, fifty per centum of daily wages during one hundred and fifty weeks.

Arm. For the loss of an arm, fifty per centum of daily wages during two hundred weeks.

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Foot. For the loss of a foot, fifty per centum of daily wages during one hundred and twenty-five weeks.

Leg. For the loss of a leg, fifty per centum of daily wages during one hundred and seventy-five weeks.

Eye. For the loss of an eye, fifty per centum of daily wages during one hundred weeks.

Both hands, etc. The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (b).

In other cases. In all other cases in this class the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule. Should the employer and employé be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule, the amount of compensation shall be settled according to the provisions of paragraph twenty hereof.

Maximum and minimum amount. The amounts specified in this clause are all subject to the same limitations as to maximum and minimum as are stated in clause (a).

12. *Basis of computation in case of death.* In case of death compensation shall be computed but not distributed on the following basis:

(1) Actual dependents.

If orphan or orphans, a minimum of twenty-five per centum of wages of deceased, with ten per centum additional for each orphan in excess of two, with a maximum of sixty per centum.

If widow alone, twenty-five per centum of wages.

If widow and one child, forty per centum of wages.

If widow and two children, forty-five per centum of wages.

If widow and three children, fifty per centum of wages.

If widow and four children, fifty-five per centum of wages.

If widow and five children or more, sixty per centum of wages.

If widow and father or mother, fifty per centum of wages.

If grandparents, grandchildren, or minor, or incapacitated brothers or sisters, twenty-five per centum of wages.

Distribution of compensation in case of death. Compensation in case of death shall be computed on the basis of the foregoing schedule, but shall be distributed according to the laws of this State providing for the distribution of the personal property of an intestate decedent, unless decedent has in fact left a will.

(2) No dependents.

Sickness and burial. Expense of last sickness and burial not exceeding two hundred dollars.

Orphans and minors. In computing compensation to orphans or other children, only those under sixteen years of age shall be included, and only during the period in which they are under that age, at which time payment on account of such child shall cease.

Weekly compensation. Proviso. Duration. The compensation in case of death shall be subject to a maximum compensation of ten dollars per week and a minimum of five dollars per week; *provided*, that if at the time of injury the employé receives wages of less than five dollars per week, then the compensation shall be the full amount of such wages per week. This compensation shall be paid during three hundred weeks.

Aliens excepted. Compensation under this schedule shall not apply to alien dependents not residents of the United States.

13. *No compensation first two weeks.* No compensation shall be allowed for the first two weeks after injury received, except as provided by paragraph fourteen, nor in any case unless the employer has actual knowledge of the injury or is

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notified thereof within the period specified in paragraph fifteen.

14. *Medical and hospital services supplied first two weeks.* During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services and medicines, as and when needed, not to exceed one hundred dollars in value, unless the employé refuses to allow them to be furnished by the employer.

15. *As to notification of employer.* Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employé, or some one on his behalf, or some of the dependents, or some one on their behalf, shall give notice thereof to the employer within fourteen days of the occurrence of the injury, then no compensation shall be due until such notice is given or knowledge obtained. If the notice is given, or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. If the notice is given, or the knowledge obtained within ninety days, and if the employé, or other beneficiary, shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another person, or to any other reasonable cause or excuse, then compensation may be allowed, unless, and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Unless knowledge be obtained, or notice given, within ninety days after the occurrence of the injury, no compensation shall be allowed.

16. *Service of notice.* The notice referred to may be served personally upon the employer, or upon any agent of the employer upon whom a summons may be served in a civil action, or by sending it through the mail to the employer at

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the last known residence or business place thereof within the State, and shall be substantially in the following form:

Form of notice. Sufficiency of notice.

To (name of employer):

You are hereby notified that a personal injury was received by (name of employé injured), who was in your employ at (place) while engaged as (nature of employment), on or about the () day of (), nineteen hundred and (), and that compensation will be claimed therefor.

Signed,

().

but no variation from this form shall be material if the notice is sufficient to advise the employer that a certain employé, by name, received an injury in the course of his employment on or about a specified time, at or near a certain place. Notice served at the office of, or on the person who was the employer's immediate superior, shall be a compliance with this act.

17. *Examination of employé as to physical condition.* After an injury, the employé, if so requested by his employer, must submit himself for examination at some reasonable time and place within the State, and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this State. If the employé requests, he shall be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employé to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect of the period of suspension.

18. *In case of dispute question submitted to court.* In case of a dispute over, or failure to agree upon, a claim for compensation between employer and employé, or the depend-

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ents of the employé, either party may submit the claim both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding.

19. *Payment in case of death.* In case of death, where no executor or administrator is qualified, the said judge shall, by order, direct payment to be made to such person as would be appointed administrator of the estate of such decedent upon like terms as to bond for the proper application of compensation payments as are required of administrators.

20. *Procedure in dispute.* Procedure in case of dispute shall be as follows:

Petition to court. Either party may present a petition to said judge setting forth the names and residences of the parties and the facts relating to employment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. This petition shall be verified by the oath or affirmation of the petitioner.

Notice of hearing. Answer filed. Upon the presentation of such petition the same shall be filed with the clerk of the court of common pleas, and the judge shall fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said petition. A copy of said

petition shall be served as summons in a civil action and may be served within four days thereafter upon the adverse party. Within seven days after the service of such notice the adverse party shall file an answer to said petition, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for a petition.

Hear witnesses. Determination. Subsequent proceedings.
As to costs. At the time fixed for hearing or any adjournment thereof the said judge shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. This determination shall be filed in writing with the clerk of the common pleas court, and judgment shall be entered thereon in the same manner as in causes tried in the court of common pleas, and shall contain a statement of facts as determined by said judge. Subsequent proceedings thereon shall only be for the recovery of moneys thereby determined to be due, provided that nothing herein contained shall be construed as limiting the jurisdiction of the Supreme Court to review questions of law by certiorari. Costs may be awarded by said judge in his discretion, and when so awarded the same costs shall be allowed, taxed and collected as are allowed, taxed and collected for like services in the common pleas court.

21. *Amount may be commuted.* The amounts payable periodically as compensation may be commuted to one or more lump sum payments by the judge of the court of common pleas having jurisdiction as set forth in the preceding paragraph, upon the application of either party, in his discretion, provided the same be in the interest of justice. Unless so approved, no compensation payments shall be commuted.

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Agreement or award may be modified. An agreement or award of compensation may be modified at any time by a subsequent agreement, or at any time after one year from the time when the same became operative it may be reviewed upon the application of either party on the ground that the incapacity of the injured employé has subsequently increased or diminished. In such case the provisions of paragraph seventeen with reference to medical examination shall apply.

22. *Compensation a preferential lien. Claims not assignable.* The right of compensation granted by this act shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this act shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment.

GENERAL PROVISIONS

SEC. III, 23. *What constitutes willful negligence.* For the purposes of this act, willful negligence shall consist of (1) deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication, operating as the proximate cause of injury.

Use of certain words. Wherever in this act the singular is used the plural shall be included; where the masculine gender is used, the feminine and neuter shall be included.

Synonyms. Employer is declared to be synonymous with master and includes natural persons, partnerships and corporations; employé is synonymous with servant and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments.

As to amputations. Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot.

24. *As to constitutionality of any provision. Relation of sections of act.* In case for any reason any paragraph or any provision of this act shall be questioned in any court and shall be held to be unconstitutional or invalid, the same shall not be held to affect any other paragraph or provision of this act, except that sections I and II are hereby declared to be inseparable, and if either section be declared void or inoperative in an essential part, so that the whole of such section must fall, the other section shall fall with it and not stand alone. Section I of this act shall not apply in cases where section II becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be in extension of the common law.

25. *Rights of action in previous cases.* Every right of action for negligence, or to recover damages for injuries resulting in death, existing before this act shall take effect, is continued, and nothing in this act contained shall be construed as affecting any such right of action nor shall the failure to give the notice provided for in section II, paragraph fifteen of this act, be a bar to the maintenance of a suit upon any right or action existing before this act shall take effect.

26. *Repealer.* All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

27. *Effective.* This act shall take effect on the fourth day of July next succeeding its passage and approval.

Approved April 4, 1911.

(L. 1911, c. 368)

A supplement to an act entitled "an act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, one thousand nine hundred and eleven.

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Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Every contract of hiring, verbal, written or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply.

2. This act shall take effect on the fourth day of July next succeeding its passage and approval.

May 2, 1911. Approved by Governor.

(L. 1911, c. 241)

An act creating the employers' liability commission and prescribing its powers and duties, and requiring reports to be made by the employers of labor upon the operations of the employers' liability law for the information of said commission.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. The Governor is hereby authorized to appoint six citizens of this State as an employers' liability commission, who shall hold their offices for the term of two years and until their successors are appointed and qualified. They shall receive no compensation for their services, but their actual traveling expenses incurred upon the business of the commission shall be paid by the State Treasurer, upon warrants approved by the president of the said commission. The commission shall have power to choose one of their number as president and one of their number as secretary, and shall have power to appoint a clerk. The expenses of the commission, the salary

of the secretary and of the clerk shall be paid from appropriations made for that purpose in any annual or supplemental appropriation bill. It shall be the duty of the commission to observe in detail, so far as possible, the operations throughout the State of the recent act of the Legislature commonly known as "The Employers' Liability Act," entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred and eleven.

2. From and after the fourth day of July next, when the said law becomes operative, every employer of labor within the State of New Jersey shall report to said commission upon the occurrence of any injury to any of his employés the name and nationality of the employé so injured, the nature and extent of such injury, whether said injured employé and the employer at the time of said injury were subject to the provisions of section one or section two of said act, and the amount of compensation when determined, together with such other facts relating to such injury as the commission may request. The information thus received shall be tabulated, from time to time, and the records thereof shall be the private records of the commission; they shall not be made public or open to inspection unless in the opinion of the commission the public interests shall require it and they shall not be used as evidence against any employer in any suit or action at law brought by any employé for the recovery of damages. The commission shall hold meetings, from time to time, as they may deem necessary, and shall present to each session of the legislature a report showing the operations under the said act during the preceding year, together with any suggestions or recommendations which they may deem necessary or proper for the improvement

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of the said act, in order to accomplish with the greatest efficiency the purposes of the said act.

3. This act shall take effect immediately. Approved by the Governor—April 27, 1911.

OHIO

(102 Ohio L. 524)

An act to create a state insurance fund for the benefit of injured, and the dependents of killed employés, and to provide for the administration of such fund by a state liability board of awards.

Be it enacted by the General Assembly of the State of Ohio.

SECTION 1. There is hereby created a state liability board of awards, to be composed of three members, not more than two of whom shall belong to the same political party, to be appointed by the governor, within thirty days after the passage of this act, one of which members shall be appointed for the term of two years, one member for four years and one member for six years, and thereafter as their terms expire the governor shall appoint one member for the term of six years. Vacancies shall be filled by appointment by the governor for the unexpired term.

SEC. 2. Each member of the board shall devote his entire time to the duties of his office and shall not hold any position of trust or profit or engage in any occupation or business interfering or inconsistent with his duty as such member, or serve on or under any committee of any political party.

SEC. 3. Each member of the board shall receive an annual salary of five thousand dollars, payable in the same manner as salaries of state officers are paid.

SEC. 4. The board shall be in continuous session and open for the transaction of business during all the business hours of each and every day, excepting Sundays and legal holidays. All sessions shall be open to the public, and shall stand and

be adjourned without further notice thereof on its records. All proceedings of the board shall be shown on its record of proceedings, which shall be a public record, and shall contain a record of each case considered, and the award made with respect thereto, and all voting shall be had by the calling of each member's name by the secretary and each vote shall be recorded as cast.

SEC. 5. A majority of the board shall constitute a quorum for the transaction of business, and a vacancy shall not impair the right of the remaining members to exercise all the powers of the full board so long as a majority remains. Any investigations, inquiry or hearing which the board is authorized to hold, or undertake, may be held or undertaken by or before any one member of the board. All investigations, inquiries, hearings and decisions of the board, and every order made by a member thereof, when approved and confirmed by a majority of the members, and so shown on its record of proceedings, shall be deemed to be the order of the board.

SEC. 6. The board shall keep and maintain its office in the city of Columbus, and shall provide a suitable room or rooms, necessary office furniture, supplies, books, periodicals and maps. All necessary expenses shall be audited and paid out of the state treasury. The board may hold sessions at any place within the State.

SEC. 7. The board may employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compensation. Such employments and compensation shall be first approved by the governor, and shall be paid out of the state treasury. The members of the board, actuaries, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants that may be employed shall be entitled to receive from the state treasury their actual and necessary expenses while traveling in the business of the board. Such expenses shall

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be itemized and sworn to by the person who incurred the expense, and allowed by the board.

SEC. 8. The board shall adopt reasonable and proper rules to govern its procedure, regulate and provide for the kind and character of notices, and the services thereof, in cases of accident and injury to employés, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund, hereinafter provided for, the forms of application of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudications and awards shall be made.

SEC. 9. Every employer shall furnish the board, upon request, all information required by it to carry out the purposes of this act. The board or any member thereof, or any person employed by the board for that purpose, shall have the right to examine under oath any employer or officer, agent or employé thereof.

SEC. 10. Every employer receiving from the board any blank with directions to fill the same, shall cause the same to be properly filled out as to answer fully and correctly all questions therein propounded, and if unable to do so shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the board within the period fixed by the board for such return.

SEC. 11. Each member of the board, the secretary and every inspector or examiner appointed by the board shall, for the purposes contemplated by this act, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.

SEC. 12. In case of disobedience of any person to comply with the order of the board, or subpœna issued by it as one of its inspectors, or examiners, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, or refuse to permit an inspection as aforesaid, the probate judge of the county in which the person resides, on application of any member of the board, or any inspector or examiner appointed by it, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of subpœnas issued from such court on a refusal to testify therein.

SEC. 13. Each officer who serves such subpœna shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpœna, before the board or an inspector or examiner, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of common pleas, which shall be audited and paid from the state treasury in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers approved by any two members of the board. No witness subpœnaed at the instance of a party other than the board or an inspector shall be entitled to compensation from the state treasury unless the board shall certify that his testimony was material to the matter investigated.

SEC. 14. In an investigation, the board may cause depositions of witnesses residing within or without the State to be taken in the manner prescribed by the law for like depositions in civil actions in the court of common pleas.

SEC. 15. A transcribed copy of the evidence and proceedings, or any specific part thereof, or any investigation, by a stenographer appointed by the board, being certified by such stenographer to be a true and correct transcript of the testimony on the investigation, or of a particular witness, or of a specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence

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and proceedings had on such investigation so purporting to be taken and subscribed, may be received in evidence by the board with the same effect as if such stenographer were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand to any party upon the payment of the fee therefor, as provided for transcript in courts of common pleas.

SEC. 16. The board shall prepare and furnish blank forms, and provide in its rules for their distribution so that the same may be readily available, of application for benefits or compensation from the state insurance fund, notices to employers, proofs of injury or death, of medical attendance, of employment and wage earnings, and such other blanks as may be deemed proper and advisable, and it shall be the duty of insured employers to constantly keep on hand a sufficient supply of such blanks.

SEC. 17. The state liability board of awards shall classify employments with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total pay roll and number of employés in each of said classes of employment, sufficiently large to provide an adequate fund for the compensation provided for in this act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year.

SEC. 18. The state liability board of awards shall establish a state insurance fund from premiums paid thereto by employers and employés as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefit of employés of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such employés, and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund.

SEC. 19. The treasurer of state shall be the custodian of the state insurance fund, and all disbursements therefrom shall be paid by him, but upon vouchers signed by any two members of the state liability board of awards.

SEC. 20. The treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund herein provided for.

SEC. 20-1. Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employé, wherever occurring, during the period covered by such premiums, provided the injured employé has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employé of his right of action as aforesaid.

Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employés of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted.

SEC. 20-2. For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employés in this State, having elected to accept the provisions of this act,

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shall pay, on or before January 1, 1912, and semi-annually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employés shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employés in the following proportions, to-wit: Ninety per cent of the premium shall be paid by the employer and ten per cent by the employés. Each employer is authorized to deduct from the pay roll of his employés ten per cent of the said premiums for any premium period in proportion to the pay roll of such employés; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employé showing the amount which has been deducted and paid into the state insurance fund.

SEC. 21. The state liability board of awards shall disburse the state insurance fund to such employés of employers as have paid into said fund the premiums applicable to the classes to which they belong, that have been injured in the course of their employment, wheresoever such injury has occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued.

SEC. 21-1. All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employés for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employés, and also to the personal representatives of such employés where death results from such injuries and in such

action the defendant shall not avail himself or itself of the following common-law defenses:

The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence.

SEC. 21-2. But where a personal injury is suffered by an employé, or when death results to an employé from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the willful act of such employer, or any of such employer's officers or agents or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employés, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employé, or his legal representative in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to any employé, or to his legal representative in case death results, except as provided in this act.

Every employé, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employé or his legal representative in case death results, who exercises his option to institute proceedings in court as provided in section 21-2, waives his right to any award; except as provided in section 36 of this act.

SEC. 23. The board shall disburse and pay from the fund, for such injury, to such employés, such amounts for medical, nurse and hospital services and medicines, as it may deem proper, not, however in any case, to exceed the sum of two

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hundred dollars, in addition to such award to such employé.

SEC. 24. In case death ensues from the injury reasonable funeral expenses, not to exceed one hundred and fifty dollars, shall be paid from the fund, in addition to such award to such employé.

SEC. 25. No benefit shall be allowed for the first week after the injury is received, except the disbursement provided for in the next two preceding sections.

SEC. 26. In case of temporary or partial disability, the employé shall receive sixty-six and two-thirds per cent of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employé's wages were less than five dollars per week, then he shall receive his full wages; but not to continue for more than six years from the date of the injury, nor to exceed three thousand four hundred dollars in amount from that injury.

SEC. 27. In case of permanent total disability the award shall be $66\frac{2}{3}\%$ of the average weekly wage, and shall continue until the death of such person so totally disabled, but not to exceed a maximum of twelve dollars per week, and not less than a minimum of five dollars per week, if the employé's wages were less than five dollars per week, then he shall receive his full wages.

SEC. 28. In case the injury causes death within the period of two years the benefits shall be in the amounts and to the persons following:

1. If there be no dependents, the disbursements from the insurance fund shall be limited to the expense provided for in sections 23 and 24.

2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent of the average weekly wage and to continue for the remainder of the period between the date of the death and

six years after the date of the injury, and not to amount to more than a maximum of thirty-four hundred dollars, nor less than a minimum of one thousand five hundred dollars.

3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent of the average weekly wage and to continue for all of such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-four hundred dollars.

SEC. 29. The benefits, in case of death, shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the board, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. Payment to a dependent subsequent in right may be made, if the board deem proper, and shall operate to discharge all other claims therefor.

SEC. 30. The dependent or person to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the board.

SEC. 31. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

SEC. 32. If it is established that the injured employé was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage.

SEC. 33. The power and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings

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or orders with respect thereto, as, in its opinion, may be justified.

SEC. 34. The board, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments.

SEC. 35. Benefits before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employés or their dependents.

SEC. 36. The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final.

Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the state liability board of awards, and he shall be notified by the clerk forthwith of the filing of such appeal.

Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant and further pleadings shall be had in said cause according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and, if they determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this act; and any final judgment so obtained shall be paid by the state liability board of awards out of the state insur-

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ance fund in the same manner as such awards are paid by such board.

The costs of such proceeding, including a reasonable attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the right to prosecute error as in the ordinary civil cases.

SEC. 36-1. Such board shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in their judgment, is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act.

SEC. 37. The board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in section 17. The salaries and compensation of the secretary, and all actuaries, accountants, inspectors, examiners, experts, clerks and other assistants, and all other expenses of the board herein authorized including the premium to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers, signed by two of the members of such board, presented to the auditor of state, who shall issue his warrant therefor as in other cases.

SEC. 38. No provision of this act relating to the amount of compensation shall be considered by, or called to the attention of the jury on the trial of any action to recover damages as herein provided.

SEC. 39. Annually on or before the 15th day of November, such board, under the oath of at least two of its members, shall make a report to the governor which shall include a statement of the number of awards made by it, and a general statement of the causes of the accidents leading to the injuries for which the awards were made, a detailed statement

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of the disbursements from the expense fund, and the condition of its respective funds, together with any other matters which such board deems it proper to call to the attention of the governor, including any recommendations it may have to make.

SEC. 40. The expense of such board in carrying out the provisions of this act shall be paid until January 1, 1912, out of the general revenue of the State not otherwise appropriated. Such expense shall not exceed twenty-five thousand dollars in addition to the salaries of members of such board.

SEC. 41. The expenses of such board in carrying out the provisions of this act shall be paid from January 1st, 1912, to January 1st, 1913, out of the general revenue fund of the State not otherwise appropriated. Such expense shall not exceed one hundred thousand dollars in addition to the salary of the members.

S. J. VINING,

Speaker of the House of Representatives.

H. L. NICHOLS,

President of the Senate.

Passed May 31st, 1911.

Approved June 15th, 1911.

JUDSON HARMON,

Governor

RHODE ISLAND AND PROVIDENCE PLANTATIONS

(L. 1912, c. 000)

(Senate No. 1)

An Act relative to payments to employés for personal injuries received in the course of their employment, and to the prevention of such injuries.

ARTICLE I

ABROGATION OF REMEDIES AND DEFENSES

REMOVAL OF DEFENSES

SECTION 1. In an action to recover damages for personal injury sustained by accident by an employé arising out of and in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense: (a) That the employé was negligent; (b) that the injury was caused by the negligence of a fellow employé; (c) that the employé has assumed the risk of the injury.

EXCEPTIONS

SEC. 2. The provisions of this act shall not apply to actions to recover damages for personal injuries, or for death resulting from personal injuries, sustained by employés engaged in domestic service or agriculture.

EXCEPTIONS

SEC. 3. The provisions of this act shall not apply to employers who employ five or less workmen or operatives regularly in the same business, but such employers may, by complying with the provisions of section 5 of this article become subject to the provisions of this act.

EMPLOYER WHO ELECTS TO PAY COMPENSATION

SEC. 4. The provisions of section 1 of this Article shall not apply to actions to recover damages for personal injuries, or for death resulting from personal injuries sustained by employés of an employer who has elected to become subject to the provisions of this act as provided in section 5 of this Article.

ELECTION, HOW MADE

SEC. 5. Such election on the part of the employer shall be made by filing with the commissioner of industrial statistics a written statement to the effect that he accepts the provisions of this act, and by giving reasonable notice of such election to his workmen by posting and keeping continuously posted copies of such statement in conspicuous places about the place where his workmen are employed, the filing of which statement and the giving of which notice shall operate to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year, each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file with said commissioner a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of this act and shall give reasonable notice to his workmen as above provided. Blank forms of election and withdrawal as herein provided, shall be furnished by said commissioner.

ELECTION BY EMPLOYÉ

SEC. 6. An employé of an employer who shall have elected to become subject to the provisions of this act as provided in section 5 of this Article shall be held to have waived his right of action at common law to recover damages for personal injuries, if he shall not have given his employer at the time of his contract of hire notice in writing that he claimed such right, and within ten days thereafter have filed a copy thereof with the commissioner of industrial statistics, or, if the contract of hire was made before the employer so elected, if the employé shall not have given the said notice and filed

the same with said commissioner within ten days after notice by the employer, as above provided, of such election; and such waiver shall continue in force for the term of one year, and thereafter without further act on his part, for successive terms of one year, each, unless such employé shall at least sixty days prior to the expiration of such first or any succeeding year, file with the said commissioner a notice in writing to the effect that he desires to claim his said right of action at common law and within ten days thereafter shall give notice thereof to his employer. A minor working at an age legally permitted under the laws of this State shall be deemed *sui juris* for the purpose of this act and no other person shall have any cause of action or right to compensation for an injury to such minor employé except as expressly provided in this act; but if said minor shall have a parent living or a guardian, such parent or guardian, as the case may be, may give the notice and file a copy of the same as herein provided by this section, and such notice shall bind the minor in the same manner that adult employés are bound under the provisions of this act. In case no such notice is given, such minor shall be held to have waived his right of action at common law to recover damages for personal injuries. Any employé, or the parent or guardian of any minor employé, who has given notice to the employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after the delivery to the employer or his agent.

IN LIEU OF OTHER REMEDIES

SEC. 7. The right to compensation for an injury, and the remedy therefor granted by this act, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employés entitled to compensation under this act while it is in effect.

ARTICLE II

PAYMENTS

TO WHOM MADE

SECTION 1. If an employé who has not given notice of his claim of common-law rights of action or who has given such notice and has waived the same, as provided in section 6 of Article I, receives a personal injury by accident arising out of and in the course of his employment, he shall be paid compensation, as hereinafter provided, by the employer who shall have elected to become subject to the provisions of this act.

WILLFUL INJURY

SEC. 2. No compensation shall be allowed for the injury or death of an employé where it is proved that his injury or death was occasioned by his willful intention to bring about the injury or death of himself or of another, or that the same resulted from his intoxication while on duty.

CONTINGENT FEES

SEC. 3. Contingent fees of attorneys for services under this act shall be subject to the approval of the superior court.

WHEN COMPENSATION BEGINS

SEC. 4. No compensation except as provided by section 12 of this Article shall be paid under this act for any injury which does not incapacitate the employé for a period of at least two weeks from earning full wages, but, if such incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury.

MEDICAL AID

SEC. 5. During the first two weeks after the injury the employer shall furnish reasonable medical and hospital

services, and medicines when they are needed, the amount of the charge for such services to be fixed, in case of the failure of the employer and employé to agree, by the superior court.

INJURIES RESULTING IN DEATH

SEC. 6. If death results from the injury, the employer shall pay the dependents of the employé wholly dependent upon his earnings for support at the time of his injury a weekly payment equal to one-half his average weekly wages, earnings or salary, but not more than ten dollars nor less than four dollars a week, for a period of three hundred weeks from the date of the injury: *Provided, however,* that, if the dependent of the employé to whom the compensation shall be payable upon his death is the widow of such employé, upon her death the compensation thereafter payable under this act shall be paid to the child or children of the deceased employé, including adopted and stepchildren, under the age of eighteen years, or over said age but physically or mentally incapacitated from earning, dependent upon the widow at the time of her death. In case there is more than one child thus dependent, the compensation shall be divided equally among them. If the employé leaves dependents only partly dependent upon his earnings for support at the time of his injury, the employer shall pay such dependents for a period of three hundred weeks from the date of the injury a weekly compensation equal to the same proportion of the weekly payments herein provided for the benefit of persons wholly dependent as the amount contributed annually by the employé to such partial dependents bears to the annual earnings of the deceased at the time of injury. When weekly payments have been made to an injured employé before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury. *Provided, however,* that, if the deceased leaves no dependents

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at the time of the injury, the employer shall not be liable to pay compensation under this act except as specifically provided in section 9 of this Article.

DEPENDENTS

SEC. 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employé:—

(a) A wife upon a husband with whom she lives or upon whom she is dependent at the time of his death.

(b) A husband upon a wife with whom he lives or upon whom he is dependent at the time of her death.

(c) A child or children, including adopted and stepchildren, under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, upon the parent with whom he is or they are living or upon whom he or they are dependent at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the compensation hereunder shall be divided equally among them.

In all other cases questions of entire or partial dependency shall be determined in accordance with the fact as the fact may have been at the time of the injury. In such other cases, if there is more than one person wholly dependent, the compensation shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof during the period in which compensation is paid to persons wholly dependent. If there is no one wholly dependent and more than one person partly dependent, the compensation shall be divided among them according to the relative extent of their dependency.

DEPENDENTS—HOW DETERMINED

SEC. 8. No person shall be considered a dependent unless he is a member of the employé's family or next of kin wholly

or partly dependent upon the wages, earnings or salary of the employé for support at the time of the injury.

FUNERAL EXPENSES

SEC. 9. If the employé dies as a result of the injury leaving no dependents at the time of the injury, the employer shall pay, in addition to any compensation provided for in this act the reasonable expense of his last sickness and burial, which shall not exceed two hundred dollars.

TOTAL INCAPACITY

SEC. 10. While the incapacity for work resulting from the injury is total, the employer shall pay the injured employé a weekly compensation equal to one-half his average weekly wages, earnings or salary, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks from the date of the injury. In the following cases it shall, for the purposes of this section, be conclusively presumed that the injury resulted in permanent total disability, to wit: The total and irrecoverable loss of sight in both eyes, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent and complete paralysis of the legs or arms, and an injury to the skull resulting in incurable imbecility or insanity.

PARTIAL INCAPACITY

SEC. 11. While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employé a weekly compensation equal to one-half the difference between his average weekly wages, earnings or salary, before the injury and the average weekly wages, earnings or salary which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by

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such compensation be greater than three hundred weeks from the date of the injury.

SPECIFIC INJURIES

SEC. 12. In case of the following specified injuries the amounts named in this section shall be paid in addition to all other compensation provided for in this act.

(a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one foot, or the entire and irrecoverable loss of the sight of both eyes, one-half of the average weekly wages, earnings or salary of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of one hundred weeks.

(b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the entire and irrecoverable loss of the sight of either eye, one-half the average weekly wages, earnings or salary of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of fifty weeks.

(c) For the loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, one-half the average weekly wages, earnings or salary of the injured person but not more than ten dollars nor less than four dollars a week, for a period of twenty-five weeks.

(d) For the loss by severance of at least one phalange of a finger, thumb, or toe, one-half the average weekly wages, earnings or salary of the injured person, but not more than ten dollars nor less than four dollars a week, for a period of twelve weeks.

AVERAGE WEEKLY WAGE DEFINED

SEC. 13. The "average weekly wages, earnings, or salary" of an injured employé shall be computed as follows:—

(a) If the injured employé has worked in the same em-

ployment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his "average weekly wages" shall be three hundred times the average daily wages, earnings or salary which he has earned in such employment during the days when so employed and working the number of hours constituting a full working day in such employment, divided by fifty-two. But where the employé is employed concurrently by two or more employers, for one of whom he works at one time and for another of whom he works at another time, his "average weekly wages" shall be computed as if the wages, earnings or salary received by him from all such employers were wages, earnings or salary earned in the employment of the employer for whom he was working at the time of the accident.

(b) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his "average weekly wages" shall be three hundred times the average daily wages, earnings, or salary which an employé of the same class working substantially the whole of such immediately preceding year in the same or a similar employment, in the same or a neighboring place, has earned in such employment during the days when so employed and working the number of hours constituting a full working day in such employment divided by fifty-two.

(c) In cases where the foregoing methods of arriving at the "average weekly wages, earnings, or salary" of the injured employé cannot reasonably and fairly be applied, such "average weekly wages" shall be taken at such sum as, having regard to the previous wages, earnings or salary of the injured employé, and of other employés of the same or most similar class, working in the same or most similar employment in the same or a neighboring locality, shall reasonably represent the weekly earning capacity of the injured

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employé at the time of the accident in the employment in which he was working at such time.

(d) Where the employer has been accustomed to pay to the employé a sum to cover any special expense incurred by said employé by the nature of his employment, the sum so paid shall not be reckoned as part of the employé's wages, earnings or salary.

(e) The fact that an employé has suffered a previous injury, or received compensation therefor, shall not preclude compensation for a later injury or for death; but in determining the compensation for the later injury or death, his "average weekly wages" shall be such sum as will reasonably represent his weekly earning capacity at the time of the later injury, in the employment in which he was working at such time, and shall be arrived at according to, and subject to the limitations of, the previous provisions of this section.

CONTRIBUTIONS BY EMPLOYÉ

SEC. 14. No savings or insurance of the injured employé, independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than the employer be considered in fixing the compensation under this act.

COMPENSATION—TO WHOM PAID

SEC. 15. The compensation payable under this act in case of the death of the injured employé shall be paid to his legal representatives; or, if he has no legal representative, to his dependents entitled thereto, or, if he leaves no such dependents, to the person to whom the expenses for the burial and last sickness are due. If the payment is made to the legal representative of the deceased employé, it shall be paid by him to the dependents or other persons entitled thereto under this act. All payments of compensation under this act shall cease upon the death of the employé from a cause

other than or not induced by the injury for which he is receiving compensation.

MINORS AND MENTALLY INCOMPETENT

SEC. 16. In case an injured employé is mentally incompetent, or, where death results from the injury, in case any of his dependents entitled to compensation hereunder are mentally incompetent or minors at the time when any right, privilege or election accrues to him or them under this act, his conservator, guardian, or next friend may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time in this act provided shall run so long as such incompetent or minor has no conservator or guardian.

NOTICE OF INJURY

SEC. 17. No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the employer within thirty days after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within one year after the occurrence of the same, or, in case of the death of the employé, or in the event of his physical or mental incapacity, within one year after death or the removal of such physical or mental incapacity.

SEC. 18. Such notice shall be in writing and shall state in ordinary language the nature, time, place, and cause of the injury, and the name and address of the person injured and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his legal representative, or by a dependent, or by a person in behalf of either.

SEC. 19. Such notice shall be served upon the employer, or upon one employer, if there are more employers than one, or, if the employer is a corporation, upon any officer or agent upon whom process may be served, by delivering the same to the person on whom it is to be served, or by leaving it at

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his last known residence or place of business, or by sending it by registered mail addressed to the person to be served, or, in the case of a corporation, to the corporation itself, at his or its last known residence or place of business; and such mailing of the notice shall constitute completed service.

SEC. 20. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the nature, time, place or cause of the injury, or the name and address of the person injured, unless it is shown that it was the intention to mislead and the employer was in fact misled thereby. Want of notice shall not be a bar to proceedings under this act, if it be shown that the employer or his agent had knowledge of the injury, or that failure to give such notice was due to accident, mistake, or unforeseen cause.

EXAMINATION OF INJURED

SEC. 21. The employé shall, after an injury, at reasonable times during the continuance of his disability, if so requested by his employer, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer. The employé shall have the right to have a physician, provided and paid for by himself, present at such examination.

Any justice of the superior court may, at any time after an injury, on the petition of the employer or employé, appoint a competent and impartial physician or surgeon to act as a medical examiner, and the reasonable fees of such medical examiner as fixed by the justice appointing him shall be paid by the party moving for such appointment.

Such medical examiner being first duly sworn to the faithful performance of his duties before the justice appointing him or clerk of the court shall thereupon, and as often as necessary, examine such injured employé in order to determine the nature, extent, and probable duration of the

injury. Such medical examiner shall file a report of every examination made of such employé in the office of the clerk of the superior court having jurisdiction of the matter as provided in section 16 of Article III of this act, and such report shall be produced in evidence in any hearing or proceeding to determine the amount of compensation due such employé under the provisions of this act. If such employé refuses to submit himself for any examination provided for in this act, or in any way obstructs any such examination, his rights to compensation shall be suspended and his compensation during such period of suspension may be forfeited.

NO WAIVER OF RIGHTS

SEC. 22. No agreement by an employé, except as provided in Article IV, to waive his rights to compensation under this act shall be valid.

CLAIMS NOT ASSIGNABLE

SEC. 23. No claims for compensation under this act, or under any alternative scheme permitted by Article IV of this act, shall be assignable, or subject to attachment, or liable in any way for any debts.

CLAIMS PREFERRED

SEC. 24. The claim for compensation under this act, or under any alternative scheme permitted by Article IV of this act, and any decree on any such claim, shall be entitled to a preference over the unsecured debts of the employer hereafter contracted to the same amount as the wages of labor are now preferred by the laws of this state; but nothing herein shall be construed as impairing any lien which the employé may have acquired.

PAYMENT OF LUMP SUM

SEC. 25. In case payments have continued for not less than six months either party may, upon due notice to the

other party, petition the superior court for an order commuting the future payments to a lump sum. Such petition shall be considered by the superior court and may be summarily granted where it is shown to the satisfaction of the court that the payment of a lump sum in lieu of future weekly payments will be for the best interest of the person or persons receiving or dependent upon such compensation, or that the continuance of weekly payments will, as compared with lump-sum payments, entail undue expense or undue hardship upon the employer liable therefor, or that the person entitled to compensation has removed or is about to remove from the United States. Where the commutation is ordered the superior court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests. Upon paying such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which, or other due proof of payment, the liability of such employer under any agreement, award, findings, or decree shall be discharged of record.

ARTICLE III

PROCEDURE

AGREEMENT AS TO COMPENSATION

SECTION 1. If the employer and the employé reach an agreement in regard to compensation under this act, a memorandum of such agreement signed by the parties shall be filed in the office of the clerk of the superior court having jurisdiction of the matter as provided in section 16 of this Article. The clerk shall forthwith docket the same in a book kept for that purpose, and shall thereupon present said agree-

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ment to a justice of the superior court, and when approved by the justice the agreement shall be enforceable by said superior court by any suitable process, including executions against goods, chattels, and real estate, and including proceedings for contempt for willful failure or neglect to obey the provisions of said agreement. No appeal shall lie from the agreement thus approved unless upon allegation that such agreement had been procured by fraud or coercion. Such agreement shall be approved by the justice only when its terms conform to the provisions of this act.

When death has resulted from the injury and the dependents of the deceased employé entitled to compensation are, or the apportionment thereof among them is, in dispute, such agreement may relate only to the amount of compensation.

FAILURE TO AGREE

SEC. 2. If the employer and employé fail to reach an agreement in regard to compensation under this act, either employer or employé, and when death has resulted from the injury and the dependents of the deceased employé entitled to compensation are, or the apportionment thereof among them is in dispute, any person in interest may file in the office of the clerk of the superior court having jurisdiction of the matter as provided in section 16 of this Article, a petition in the nature of a petition in equity setting forth the names and residences of the parties, the facts relating to employment at the time of the injury, the cause, extent and character of the injury, the amount of wages, earnings, or salary received at the time of the injury, and the knowledge of the employer or notice of the occurrence of the injury and such other facts as may be necessary and proper for the information of the court, and shall state the matter in dispute and the claims of the petitioner with reference thereto.

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COPY OF PETITION

SEC. 3. Within four days after the filing of the petition, a copy thereof, attested by the petitioner or his attorney, shall be served upon the respondent in the same manner as a writ of summons in a civil action.

ANSWER TO PETITION

SEC. 4. Within ten days after the filing of the petition, the respondent shall file an answer to said petition, together with a copy thereof for the use of the petitioner, which shall state the claims of the respondent with reference to the matter in dispute as disclosed by the petition. No pleadings other than petition and answer shall be required to bring the cause to a hearing for final determination. The superior court may grant further time for filing the answer and allow amendments of said petition and answer at any stage of the proceedings. If the respondent do not file an answer, the cause shall proceed without formal default or decree pro confesso. If the respondent be an infant or person under disability, the superior court shall appoint a guardian ad litem for such infant or person under disability. Such guardian ad litem may be appointed on any court day after service of the copy referred to in section 3 of this Article, upon motion of any party after notice given as required for motions made in the superior court, and opportunity to said infant or person under disability to be heard in regard to the choice of such guardian ad litem. The guardian ad litem so appointed shall file the answer required by this section.

ASSIGNMENT FOR HEARING

SEC. 5. The petition shall be in order for assignment for hearing on the motion day which occurs next after fifteen days from the filing of the petition. Upon the days upon which said petition shall be in order for hearing it shall take

precedence of other cases upon the calendar, except cases for tenements let or held at will or by sufferance.

HEARING

SEC. 6. The justice to whom said petition shall be referred by the court shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. His decision shall be filed in writing with the clerk, and a decree shall be entered thereon. Such decree shall be enforceable by said superior court by any suitable process, including executions against goods, chattels, and real estate, and including proceedings for contempt for willful failure or neglect to obey the provisions of said decree. Such decree shall contain findings of fact, which, in the absence of fraud, shall be conclusive. The superior court may award as costs the actual expenditures, or such part thereof as to the court shall seem meet, but not including counsel fees, and shall include such costs in its decree. The superior court may refuse to award costs, and no costs shall be awarded against an infant or person under disability or against a guardian ad litem.

APPEAL

SEC. 7. Any person aggrieved by the final decree of the superior court under this act may appeal to the supreme court upon any question of law or equity decided adversely to the appellant by said final decree or by any proceeding or ruling prior thereto appearing of record, the appellant having first had his objections noted to any adverse rulings made during the progress of the trial at the time such rulings were made, if made in open court and not otherwise of record.

The appellant shall take the following steps:

(a) Within ten days after entry of said final decree he shall file a claim of appeal and, if a transcript of the testimony and rulings or any part thereof be desired, a written request therefor.

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(b) Within such time as the justice of the superior court who heard the petition, or, in case of his inability to act from any cause within such time as any other justice thereof shall fix, whether by original fixing of the time, or by extension thereof, or by a new fixing after any expiration thereof, the appellant shall file reasons of appeal stating specifically all the questions of law or equity decided adversely to him which he desires to include in his reasons of appeal, together with a transcript of as much of the testimony and rulings as may be required. The supreme court may allow amendments of said reasons of appeal. Upon the filing of said reasons of appeal and transcript, the clerk of the superior court shall present the transcript to the justice who heard the cause for allowance. The justice after hearing and examination, shall restore the transcript to the files of the clerk with a certificate of his action thereon made within twenty days after filing the transcript, unless the twentieth day shall fall in vacation, in which event the certificate may be filed at any time before the first Monday in the following month of October.

If the transcript be not allowed by the justice who heard the cause within the time prescribed, or objection to his allowance be made by any party, the correctness of the transcript may be determined by the supreme court by petition filed within thirty days after filing the transcript, unless the thirtieth day shall fall in vacation, in which event the correctness of the transcript may be determined by petition filed on or before the tenth day after the first Monday in the following month of October. In all other respects than in time of filing the same course shall be followed as provided in section 21 of Chapter 298 of the General Laws for establishing the truth of exceptions.

APPEAL

SEC. 8. Upon the restoration of the transcript to the files, or, if there be no transcript, then upon the filing of the rea-

sons of appeal, the clerk of the superior court shall certify the cause and all papers to the supreme court.

APPEAL SUSPENDS DECREE

SEC. 9. The claim of an appeal shall suspend the operation of the decree appealed from, but, in case of default in taking the procedure required, such suspension shall cease and the superior court upon motion of any party shall proceed as if no claim of appeal had been made, unless it be made to appear to the superior court that the default no longer exists.

MOTION DAY

SEC. 10. Any court day in the supreme court shall be a motion day for the purpose of hearing a motion to assign the appeal for hearing.

DECISION

SEC. 11. The supreme court after hearing any appeal shall determine the same, and affirm, reverse or modify the decree appealed from, and may itself take, or cause to be taken by the superior court, such further proceedings as shall seem just. If a new decree shall be necessary, it shall be framed by the supreme court for entry by the superior court. Thereupon the cause shall be remanded to the superior court for such further proceedings as shall be required.

EXECUTION

SEC. 12. No process for the execution of a final decree of the superior court from which an appeal may be taken shall issue until the expiration of ten days after the entry thereof, unless all parties against whom such decree is made waive an appeal by a writing filed with the clerk or by causing an entry thereof to be made on the docket.

QUESTIONS OF LAW

SEC. 13. If, in the course of the proceedings in any cause, any question of law shall arise which in the opinion of the superior court is of such doubt and importance, and so affects the merits of the controversy, that it ought to be determined by the supreme court before further proceedings, the superior court may certify such question to the supreme court for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties.

REVIEW OF DECREES

SEC. 14. At any time before the expiration of two years from the date of the approval of an agreement, or the entry of a decree fixing compensation, but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement or decree, but not afterwards, any agreement, award, findings or decree may be from time to time reviewed by the superior court upon the application of either party, after due notice to the other party, upon the ground that the incapacity of the injured employé has subsequently ended, increased, or diminished. Upon such review the court may increase, diminish, or discontinue the compensation from the date of the application for review, in accordance with the facts, or make such other order as the justice of the case may require, but shall order no change of the status existing prior to the application for review. The finding of the court upon such review shall be served on the parties and filed with the clerk of the court having jurisdiction, in like time and manner and subject to like disposition as in the case of original decrees; *provided* that an agreement for compensation may be modified at any time by a subsequent agreement between the parties approved by the superior court in the same manner as original agreements in

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regard to compensation are required to be approved by the provisions of Section 1 of Article III of this act.

PROCEDURE

SEC. 15. The superior court shall prescribe forms and make suitable orders as to procedure adapted to secure a speedy, efficient and inexpensive disposition of all proceedings under this act; and in making such orders said court shall not be bound by the provisions of the General Laws relating to practice. In the absence of such orders, special orders shall be made in each case.

ACTIONS WHERE BROUGHT

SEC. 16. Proceedings shall be brought either in the county where the accident occurred or in the county where the employer or employé lives or has a usual place of business. The court where any proceeding is brought shall have power to grant a change of venue.

ACTIONS NOT TO ABATE

SEC. 17. No proceedings under this act shall abate because of the death of the petitioner, but may be prosecuted by his legal representative or by any person entitled to compensation by reason of said death, under the provisions of this act.

CLAIM WHEN BARRED

SEC. 18. An employé's claim for compensation under this act shall be barred unless an agreement or a petition, as provided in this Article, shall be filed within two years after the occurrence of the injury, or, in case of the death of the employé, or, in the event of his physical or mental incapacity, within two years after the death of the employé or the removal of such physical or mental incapacity.

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MONTHLY PAYMENTS

SEC. 19. If an employé receiving a weekly payment under this act shall cease to reside in the state, or, if his residence at the time of the accident is in an adjoining state, the superior court, upon the application of either party, may, in its discretion, having regard to the welfare of the employé and the convenience of the employer, order such payment to be made monthly or quarterly instead of weekly.

COURT SETTLES QUESTIONS

SEC. 20. All questions arising under this act, if not settled by agreement of the parties interested therein, shall, except as otherwise herein provided, be determined by the superior court.

LIABILITY OF OTHER THAN EMPLOYER

SEC. 21. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employé may take proceedings both against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to receive both damages and compensation; and if the employé has been paid compensation under this act, the person by whom the compensation was paid shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and, to the extent of such indemnity, shall be subrogated to the rights of the employé to recover damages therefor.

ARTICLE IV

ALTERNATIVE SCHEMES PERMITTED

EMPLOYER AND EMPLOYÉ MAY AGREE

SECTION 1. Any employer may enter into an agreement with his employés in any employment to which this act ap-

plies to provide a scheme of compensation, benefit, or insurance, in lieu of the compensation provided for in this act, subject to the approval of the superior court. Such approval shall be granted only on condition that the scheme proposed provides as great benefits as those provided by this act; and, if the scheme provides for contributions by employés, it shall confer additional benefits at least equivalent to these contributions. If such a scheme meets with the approval of said court, the clerk shall issue a certificate enabling the employer to contract with any or all of his employés in employments to which this act applies to substitute such scheme for the provisions of this act for a period of not more than five years.

AGREEMENT MUST CONTAIN

SEC. 2. No scheme which provides for contributing by employés shall be so certified which does not contain suitable provisions for the equitable distribution of any money or securities held for the purpose of the scheme, after due provision has been made to discharge the liabilities already incurred, if and when such certificate is revoked or the scheme otherwise terminated.

AGREEMENT REVOKED

SEC. 3. If at any time the scheme no longer fulfills the requirements of this Article, or is not fairly administered, or any other valid and substantial reason therefor exists, the superior court, on reasonable notice to the interested parties, shall revoke the certificate and the scheme shall thereby be terminated.

ARTICLE V

MISCELLANEOUS PROVISIONS

SECTION 1. In this act, unless the context otherwise requires:

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(a) "Employer" includes any person, copartnership, corporation or voluntary association, and the legal representative of a deceased employer.

(b) "Employé" means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer, and whose remuneration does not exceed eighteen hundred dollars a year. It does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employer's trade or business. Any reference to an employé who has been injured shall, where the employé is dead, include a reference to his dependents as hereinbefore defined, or to his legal representative, or, where he is a minor, or incompetent, to his conservator or guardian.

SEC. 2. Nothing in this act shall affect the liability of the employer to a fine or penalty under any other statute.

SEC. 3. The provisions of this act shall not apply to injuries sustained, or accidents which occur, prior to the taking effect hereof.

SEC. 4. If any section of this act shall be declared unconstitutional or invalid, such unconstitutionality or invalidity shall in no way affect the validity of any other portion thereof which can be given reasonable effect without the part so declared unconstitutional or invalid.

SEC. 5. In all cases where an employer and employé shall have elected to become subject to the provisions of this act, the provisions of section 14 of Chapter 283 of the General Laws shall not apply while this act is in effect.

SEC. 6. All acts and parts of acts inconsistent herewith are hereby repealed.

SEC. 7. This act may be cited as "Workmen's Compensation Act."

SEC. 8. This act shall take effect on the first day of October, nineteen hundred and twelve.

Approved by Governor, April 29, 1912.

WASHINGTON

(L. 1911, c. 74)

An act relating to the compensation of injured workmen in our industries, and the compensation to their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the nonobservance of regulations for the prevention of such injuries and for violation of its provisions, asserting and exercising the police power in such cases, and, except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595 and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington, relating to employes in factories, mills or workshops where machinery is used, actions for the recovery of damages and prescribing a punishment for violation thereof.

Be it enacted by the Legislature of the State of Washington:

DECLARATION OF POLICE POWER

SECTION 1. The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate.

Washington

Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the State depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this act provided.

ENUMERATION OF EXTRA HAZARDOUS WORKS

SEC. 2. There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the State, in the following enumeration, and they are intended to be embraced within the term "extra hazardous" wherever used in this act, to-wit:

Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works; laundries operated by power; quarries; engineering works; logging, lumbering and ship building operations; logging, street and interurban railroads; buildings being constructed, repaired, moved or demolished; telegraph, telephone, electric light or power plants or lines, steam

heating or power plants, steamboats, tugs, ferries and railroads. If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4.

DEFINITIONS

SEC. 3. In the sense of this act words employed mean as here stated, to-wit:

Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern.

Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control.

Mill means any plant, premises, room or place where machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers.

Mine means any mine where coal, clay, ore, mineral, gypsum or rock is dug or mined underground.

Quarry means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction.

Washington

Engineering work means any work of construction, improvement or alteration or repair of buildings, structures, streets, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals; electric, steam or water power plants; telegraph and telephone plants and lines; electric light or power lines, and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used.

Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this State in any extra hazardous work.

Workman means every person in this State, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: *Provided, however,* That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the State for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the State may be prosecuted, or compromised by the depart-

ment, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the average salary or wage named in such pay roll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman.

Dependent means any of the following named relatives of a workman whose death results from any injury and who leaves surviving no widow, widower, or child under the age of sixteen years, viz.; invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father, mother, grandfather, grandmother, step-father, step-mother, grandson, granddaughter, step-son, step-daughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident, are dependent, in whole or in part, for their support upon the earnings of the workman. Except where otherwise provided by treaty, aliens, other than father or mother, not residing within the United States at the time of the accident, are not included.

Beneficiary means a husband, wife, child or dependent of a workman, in whom shall vest a right to receive payment under this act.

Invalid means one who is physically or mentally incapacitated from earning.

The word "child," as used in this act, includes a posthumous child, a child legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury.

The words injury or injured, as used in this act, refer only to an injury resulting from some fortuitous event as distinguished from the contraction of disease.

Washington

SCHEDULE OF CONTRIBUTION

SEC. 4. Inasmuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with the following schedule, a sum equal to a percentage of his total pay roll for that year, to-wit (the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard):

Construction Work

Tunnels; bridges; trestles; sub-aqueous works; ditches and canals (other than irrigation without blasting); dock excavation; fire escapes; sewers; house moving; house wrecking.065
Iron, or steel frame structures or parts of structures. . .	.080
Electric light or power plants or systems; telegraph or telephone systems; pile driving; steam railroads. . .	.050
Steeple, towers or grain elevators, not metal framed; dry-docks without excavation; jetties; breakwaters; chimneys; marine railways; waterworks or systems; electric railways with rock work or blasting; blasting; erecting fireproof doors or shutters.050
Steam heating plants; tanks, water towers or wind-mills, not metal frames.040
Shaft sinking.060
Concrete buildings; freight or passenger elevators; fireproofing of buildings; galvanized iron or tin works; gas works, or systems; marble, stone or brick work; road making with blasting; roof work; safe moving; slate work; outside plumbing work; metal smokestacks or chimneys.050
Excavations not otherwise specified; blast furnaces. . .	.040
Street or other grading; cable or electric street railways	

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without blasting; advertising signs; ornamental metal work in buildings.035
Ship or boat building or wrecking with scaffolds; floating docks.045
Carpenter work not otherwise specified.035
Installation of steam boilers or engines; placing wire in conduits; installing dynamos; putting up belts for machinery; marble, stone or tile setting, inside work; mantel setting; metal ceiling work; mill or ship wrighting; painting of buildings or structures; installation of automatic sprinklers; ship or boat rigging; concrete laying in floors, foundations or street paving; asphalt laying; covering steam pipes or boilers; installation of machinery not otherwise specified	.030
Drilling wells; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems; glass setting; building hot houses; lathing; paper hanging; plastering; inside plumbing; wooden stair building; road making.020

Operation (Including Repair Work) of

(All combinations of material take the higher rate when not otherwise provided.)

Logging railroads; railroads; dredges; interurban electric railroads using third rail system; dry or floating docks.050
Electric light or power plants; interurban electric railroads not using third rail system; quarries.040
Street railways, all employes; telegraph or telephone systems; stone crushing; blasting furnaces; smelters; coal mines; gas works; steamboats; tugs; ferries. . .	.030
Mines, other than coal; steam heating or power plants.025
Grain elevators; laundries; waterworks; paper or pulp mills; garbage works.020

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Factories Using Power-Driven Machinery

Stamping tin or metal.....	.045
Bridge work; railroad car or locomotive making or repairing; cooperage; logging with or without machinery; saw mills; shingle mills; staves; veneer; box; lath; packing cases; sash, door or blinds; barrel; keg; pail; basket; tub; wooden ware or wooden fibre ware; rolling mills; making steam shovels or dredges; tanks; water towers; asphalt; building material not otherwise specified; fertilizer; cement; stone with or without machinery; kindling wood; masts and spars with or without machinery; canneries, metal stamping extra; creosoting works; pile treating works.....	.025
Excelsior; iron, steel, copper, zinc, brass or lead articles or wares not otherwise specified; working in wood not otherwise specified; hardware; tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware; peat fuel; brickettes.....	.020
Breweries; bottling works; boiler works; foundries; machine shops not otherwise specified.....	.020
Cordage; working in food stuffs, including oils, fruits and vegetables; working in wool, cloth, leather, paper, broom, brush, rubber or textiles not otherwise specified.....	.015
Making jewelry, soap, tallow, lard, grease, condensed milk.....	.015
Creameries; printing; electrotyping; photo-engraving; lithographing.....	.015

Miscellaneous Work

Stevedoring; longshoring.....	.030
Operating stock yards, with or without railroad entry; packing houses.....	.025

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Wharf operation; artificial ice, refrigerating or cold storage plants; tanneries; electric systems not otherwise specified.	020
Theater stage employés.	015
Fire works manufacturing.050
Powder works.100

The application of this act as between employers and workmen shall date from and include the first day of October, 1911. The payment for 1911 shall be made prior to the day last named, and shall be preliminarily collected upon the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts shall be made upon the basis of the actual pay roll. Any shortage shall be made good on or before February 1st, following. Every employer who shall enter into business at any intermediate day shall make his payment for the initial year or portion thereof before commencing operation; its amount shall be calculated upon his estimated pay roll, an adjustment shall be made on or before February 1st of the following year in the manner above provided.

For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: *Provided*, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case

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of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund.

The fund thereby created shall be termed the "accident fund" which shall be devoted exclusively to the purpose specified for it in this act.

In that the intent is that the fund created under this section shall ultimately become neither more or less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.

It shall be unlawful for the employer to deduct or obtain any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deduction shall be a gross misdemeanor. If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. Any such change in classification of risks or premium rates, or any change caused by change in the class of work, occurring during the year shall, at the time of the annual adjustment, be adjusted by the department in proportion to its duration in accordance with the schedule of this section. If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency

shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year.

For the purposes of such payment and making good of deficit, the particular classes of industry shall be as follows:

CONSTRUCTION WORK

Class 1. Tunnels; sewer; shaft sinking; drilling wells.

Class 2. Bridges; mill wrighting; trestles; steeples, towers or grain elevators not metal framed; tanks, water towers, wind-mills not metal framed.

Class 3. Sub-aqueous works; canal other than irrigation or docks with or without blasting; pile driving; jetties; breakwaters; marine railways.

Class 4. House moving; house wrecking; safe moving.

Class 5. Iron or steel frame structures or parts of structures; fire escapes; erecting fire proof doors or shutters; blast furnaces; concrete chimneys; freight or passenger elevators; fire proofing of buildings; galvanized iron or tin work; marble, stone or brick work; roof work; slate work; plumbing work; metal smoke stack or chimneys; advertising signs; ornamental metal work in buildings; carpenter work not otherwise specified; marble, stone or tile setting; mantel setting; metal ceiling work; painting of buildings or structures; concrete laying in floors or foundations, glass setting; building hot houses; lathing; paper hanging; plastering; wooden star building.

Class 6. Electric light and power plants or system; telegraph or telephone systems; cable or electric railways with or without rock work or blasting; waterworks or systems; steam heating plants; gas works or systems; installation of steam boilers or engines; placing wires in conduits; installing dynamos; putting up belts for machinery; installation of automatic sprinklers; covering steam pipes or boilers; installation of machinery not otherwise specified; installing

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electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems.

Class 7. Steam railroads; logging railroads.

Class 8. Road making; street or other grading; concrete laying in street paving; asphalt laying.

Class 9. Ship or boat building with scaffolds; ship wrighting; ship or boat rigging; floating docks.

OPERATION (INCLUDING REPAIR WORK) OF

Class 10. Logging; saw mills; shingle mills; lath mills; masts and spars with or without machinery.

Class 12. Dredges; dry or floating docks.

Class 13. Electric light or power plants or systems; steam heat or power plants or systems; electric systems not otherwise specified.

Class 14. Street railways.

Class 15. Telegraph systems; telephone systems.

Class 16. Coal mines.

Class 17. Quarries; stone crushing; mines other than coal.

Class 18. Blast furnaces; smelters; rolling mills.

Class 19. Gas works.

Class 20. Steamboats; tugs; ferries.

Class 21. Grain elevators.

Class 22. Laundries.

Class 23. Water works.

Class 24. Paper or pulp mills.

Class 25. Garbage works; fertilizer.

FACTORIES (USING POWER-DRIVEN MACHINERY)

Class 26. Stamping tin or metal.

Class 27. Bridge work; making steam shovels or dredges; tanks; water towers.

Class 28. Railroad car or locomotive making or repairing.

Class 29. Cooperage; staves; veneer; box packing cases; sash [,] door or blinds; barrel; keg; pail; basket; tub; wood

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ware or wood fibre ware; kindling wood; excelsior; working in wood not otherwise specified.

Class 30. Asphalt.

Class 31. Cement; stone with or without machinery; building material not otherwise specified.

Class 32. Canneries of fruits or vegetables.

Class 33. Canneries of fish or meat products.

Class 34. Iron, steel, copper, zinc, brass or lead articles or wares; hardware; boiler works; foundries; machine shops not otherwise specified.

Class 35. Tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware.

Class 36. Peat fuel; brickettes.

Class 37. Breweries; bottling works.

Class 38. Cordage; working in wool, cloth, leather, paper, brush, rubber or textile not otherwise specified.

Class 39. Working in food stuffs, including oils, fruits, vegetables.

Class 40. Condensed milk; creameries.

Class 41. Printing, electrotyping; photo-engraving; engraving; lithographing; making jewelry.

Class 42. Stevedoring; longshoring; wharf operation.

Class 43. Stock yards; packing houses; making soap, tallow, lard, grease; tanneries.

Class 44. Artificial ice, refrigerating or cold storage plants.

Class 45. Theatre stage employés.

Class 46. Fire works manufacturing; powder works.

Class 47. Cresoting works; pile treating works.

If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay roll of each occupation if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employés and the relative hazards. If an employer besides employing work-

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men in extra hazardous employment shall also employ workmen in employment not extra hazardous the provisions of this act shall apply only to the extra hazardous departments and employments and the workmen employed therein. In computing the pay roll the entire compensation received by every workman employed in extra hazardous employment shall be included, whether it be in the form of salary; wage, piece work, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise.

SCHEDULE OF AWARDS

SEC. 5. Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

COMPENSATION SCHEDULE

(a) Where death results from the injury the expenses of burial shall be paid in all cases, not to exceed \$75.00 in any case, and

(1) If the workman leaves a widow or invalid widower, a monthly payment of \$20.00 shall be made throughout the life of the surviving spouse, to cease at the end of the month in which remarriage shall occur; and the surviving spouse shall also receive \$5.00 per month for each child of the deceased under the age of sixteen years at the time of the occurrence of the injury until such minor child shall reach the age of sixteen years, but the total monthly payment under this paragraph (1) of subdivision (a) shall not exceed

\$35.00. Upon remarriage of a widow she shall receive, once and for all, a lump sum equal to twelve times her monthly allowance, viz.: the sum of \$240.00, but the monthly payment for the child or children shall continue as before.

(2) If the workman leaves no wife or husband, but a child or children under the age of sixteen years, a monthly payment of \$10.00 shall be made to each such child until such child shall reach the age of sixteen years, but the total monthly payment shall not exceed \$35.00, and any deficit shall be deducted proportionately among the beneficiaries.

(3) If the workman leaves no widow, widower, or child under the age of sixteen years, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to fifty per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed \$20.00 per month. If any dependent is under the age of sixteen years at the time of the occurrence of the injury, the payment to such dependent shall cease when such dependent shall reach the age of sixteen years. The payment to any dependent shall cease if and when, under the same circumstances, the necessity creating the dependency would have ceased if the injury had not happened.

If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive \$20.00 per month for each month after his death until the time at which he would have arrived at the age of twenty-one years.

(4) In the event a surviving spouse receiving monthly payments shall die, leaving a child or children under the age of sixteen years, the sum he or she shall be receiving on account of such child or children shall be thereafter, until such child shall arrive at the age of sixteen years, paid to the child increased 100 per cent, but the total to all

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children shall not exceed the sum of thirty-five dollars per month.

(b) Permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation.

When permanent total disability results from the injury the workman shall receive monthly during the period of such disability:

(1) If unmarried at the time of the injury, the sum of \$20.00.

(2) If the workman have a wife or invalid husband, but no child under the age of sixteen years, the sum of \$25.00. If the husband is not an invalid, the monthly payment of \$25.00 shall be reduced to \$15.00.

(3) If the workman have a wife or husband and a child or children under the age of sixteen years, or, being a widow or widower, have any such child or children, the monthly payment provided in the preceding paragraph shall be increased by five dollars for each such child until such child shall arrive at the age of sixteen years, but the total monthly payment shall not exceed thirty-five dollars.

(c) If the injured workman die during the period of total disability, whatever the cause of death, leaving a widow, invalid widower or child under the age of sixteen years, the surviving widow or invalid widower shall receive twenty dollars per month until death or remarriage, to be increased five dollars per month for each child under the age of sixteen years until such child shall arrive at the age of sixteen years but if such child is or shall be without father or mother, such child shall receive ten dollars per month until arriving at the age of sixteen years. The total combined monthly payment under this paragraph shall in no case exceed thirty-five dollars. Upon remarriage the payments on account

of a child or children shall continue as before to the child or children.

(d) When the total disability is only temporary, the schedule of payment contained in paragraphs (1), (2) and (3) of the foregoing subdivision (d) shall apply so long as the total disability shall continue, increased 50 per cent for the first six months of such continuance, but in no case shall the increase operate to make the monthly payment exceed sixty per cent of the monthly wage (the daily wage multiplied by twenty-six) the workman was receiving at the time of his injury. As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old. No compensation shall be payable out of the accident fund unless the loss of earning power shall exceed five per cent.

(e) For every case of injury resulting in death or permanent total disability it shall be the duty of the department to forthwith notify the state treasurer, and he shall set apart out of the accident fund a sum of money for the case, to be known as the estimated lump value of the monthly payments provided for it, to be calculated upon the theory that a monthly payment of twenty dollars, to a person thirty years of age, is equal to a lump sum payment, according to the expectancy of life as fixed by the American Mortality Table, of four thousand dollars, but the total in no case to exceed the sum of four thousand dollars. The state treasurer shall invest said sum at interest in the class of securities provided by law for the investment of the permanent school fund, and out of the same and its earnings shall be paid the monthly installments and any lump sum payment then or thereafter arranged for the case. Any deficiency shall be

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made good out of, and any balance or overplus shall revert to the accident fund. The state treasurer shall keep accurate account of all such segregations of the accident fund, and may borrow from the main fund to meet monthly payments pending conversion into cash of any security and, in such case shall repay such temporary loan out of the cash realized from the security.

(f) Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of \$1,500.00. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum. If the injured workman be under the age of twenty-one years and unmarried, the parents or parent shall also receive a lump sum payment equal to ten per cent of the amount awarded the minor workman.

(g) Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjusted according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.

(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation terminated in any case the department may, upon

the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.

(i) A husband or wife of an injured workman, living in a state of abandonment for more than one year at the time of the injury or subsequently, shall not be a beneficiary under this act.

(j) If a beneficiary shall reside or remove out of the State the department may, in its discretion, convert any monthly payments as provided for such case into a lump sum payment (not in any case to exceed \$4,000.00) upon the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20.00 to a person thirty years of age is worth \$4,000.00, or, with the consent of the beneficiary, for a smaller sum.

(k) Any court review under this section shall be initiated in the county where the workman resides or resided at the time of the injury, or in which the injury occurred.

INTENTIONAL INJURIES—STATUS OF MINORS

SEC. 6. If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the accident fund. If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman, the widow, widower, child or dependent of the workman shall have the privilege to take under this act and also have cause of action against the employer, as if this act had not been enacted, for any excess of damage over the amount received or receivable under this act.

A minor working at an age legally permitted under the laws of this State shall be deemed *sui juris* for the purpose

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of this act, and no other person shall have any cause or action or right to compensation for an injury to such minor workman except as expressly provided in this act, but in the event of a lump sum payment becoming due under this act to such minor workman, the management of the sum shall be within the probate jurisdiction of the courts the same as other property of minors.

CONVERSION INTO LUMP SUM PAYMENT

SEC. 7. In case of death or permanent total disability the monthly payment provided may be converted, in whole or in part, into a lump sum payment (not in any case to exceed \$4,000.00), on the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20.00 to a person thirty years of age is worth the sum of \$4000.00, in which event the monthly payment shall cease in whole or in part accordingly or proportionately. Such conversion may only be made after the happening of the injury and upon the written application of the beneficiary (in case of minor children, the application may be by either parent) to the department, and shall rest in the discretion of the department. Within the rule aforesaid the amount and value of the lump sum payment may be agreed upon between the department and the beneficiary.

DEFAULTING EMPLOYERS

SEC. 8. If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the State as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits

of this act, but shall be liable to suit by the injured workman (or the husband, wife, child or dependent of such workman in case death result from the accident), as he would have been prior to the passage of this act.

In case the recovery actually collected in such suit shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the State for the benefit of the accident fund. In any suit brought upon such cause of action the defense of fellow servant and assumption of risk shall be inadmissible, and the doctrine of comparative negligence shall obtain. Any such cause of action assigned to the State may be prosecuted or compromised by the department in its discretion. Any compromise by the workman of any such suit, which would have a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

EMPLOYER'S RESPONSIBILITY FOR SAFEGUARD

SEC. 9. If any workman shall be injured because of the absence of any safeguard or protection required to be provided or maintained by, or pursuant to, any statute or ordinance, or any departmental regulation under any statute, or be, at the time of the injury, of less than the maximum age prescribed by law for the employment of a minor in the occupation in which he shall be engaged when injured, the employer shall, within ten days after demand therefor by the department, pay into the accident fund, in addition to the same required by section 4 to be paid:

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(a) In case the consequent payment to the workman out of the accident fund be a lump sum, a sum equal to 50 per cent of that amount.

(b) In case the consequent payment to the workman be payable in monthly payments, a sum equal to 50 per cent of the lump value of such monthly payment, estimated in accordance with the rule stated in section 7.

The foregoing provisions of this act shall not apply to the employer if the absence of such guard or protection be due to the removal thereof by the injured workman himself or with his knowledge by any of his fellow workmen, unless such removal be by order or direction of the employer or superintendent or foreman of the employer, or any one placed by the employer in control or direction of such workman. If the removal of such guard or protection be by the workman himself or with his consent by any of his fellow workmen, unless done by order or direction of the employer or the superintendent or foreman of the employer, or any one placed by the employer in control, or direction of such workman, the schedule of compensation provided in section 5 shall be reduced 10 per cent for the individual case of such workman.

EXEMPTION OF AWARDS

SEC. 10. No money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor ever be taken in execution or attached or garnished, nor shall the same pass to any other person by operation of law. Any such assignment or charge shall be void.

NONWAIVER OF ACT BY CONTRACT

SEC. 11. No employer or workman shall exempt himself from the burden or waive the benefits of this act by any con-

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tract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be *pro tanto* void.

FILING CLAIM FOR COMPENSATION

SEC. 12. (a) Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him, and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.

(b) Where death results from injury the parties entitled to compensation under this act, or some one in their behalf, shall make application for the same to the department, which application must be accompanied with proof of death and proof of relationship showing the parties to be entitled to compensation under this act, certificates of attending physician, if any, and such other proof as required by the rules of the department.

(c) If change of circumstance warrant an increase or rearrangement of compensation, like application shall be made therefor. No increase or rearrangement shall be operative for any period prior to application therefor.

(d) No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued.

MEDICAL EXAMINATION

SEC. 13. Any workman entitled to receive compensation under this act is required, if requested by the department, to submit himself for medical examination at a time and from time to time at a place reasonably convenient for the workman and as may be provided by the rules of the department. If the workman refuses to submit to any such examination,

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or obstructs the same, his rights to monthly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

NOTICE OF ACCIDENT

SEC. 14 Whenever any accident occurs to any workman it shall be the duty of the employer to at once report such accident and the injury resulting therefrom to the department and also to any local representative of the department. Such report shall state:

1. The time, cause and nature of the accident and injuries, and the probable duration of the injury resulting therefrom.
2. Whether the accident arose out of or in the course of the injured person's employment.
3. Any other matters the rules and regulations of the department may prescribe.

INSPECTION OF EMPLOYER'S BOOKS

SEC. 15. The books, records and pay rolls of the employer pertinent to the administration of this act shall always be open to inspection by the department or its traveling auditor, agent or assistant, for the purpose of ascertaining the correctness of the pay roll, the men employed, and such other information as may be necessary for the department and its management under this act. Refusal on the part of the employer to submit said books, records and pay rolls for such inspection to any member of the commission, or any assistant presenting written authority from the commission, shall subject the offending employer to a penalty of one hundred dollars for each offense, to be collected by civil action in the name of the State and paid into the accident fund, and the individual who shall personally give such refusal shall be guilty of misdemeanor.

PENALTY FOR MISREPRESENTATION AS TO PAY ROLL

SEC. 16. Any employer who shall misrepresent to the department the amount of pay roll upon which the premium under this act is based shall be liable to the State in ten times the amount of the difference in premium paid and the amount the employer should have paid. The liability to the State under this section shall be enforced in a civil action in the name of the State. All sums collected under this section shall be paid into the accident fund.

PUBLIC AND CONTRACT WORK

SEC. 17. Whenever the State, county or any municipal corporation shall engage in any extra hazardous work in which workmen are employed for wages, this act shall be applicable thereto. The employer's payments into the accident fund shall be made from the treasury of the State, county or municipality. If said work is being done by contract, the pay roll of the contractor and the sub-contractor shall be the basis of computation, and in the case of contract work consuming less than one year in performance the required payment into the accident fund shall be based upon the total pay roll. The contractor and any sub-contractor shall be subject to the provisions of the act, and the State for its general fund, the county or municipal corporation shall be entitled to collect from the contractor the full amount payable to the accident fund, and the contractor, in turn shall be entitled to collect from the sub-contractor his proportionate amount of the payment. The provisions of this section shall apply to all extra hazardous work done by contract, except that in private work the contractor shall be responsible, primarily and directly, to the accident fund for the proper percentage of the total pay roll of the work and the owner of the property affected by the contract shall be surety for such payments. Whenever and so long as, by state law, city charter or municipal ordinance, provision

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is made for municipal employ  s injured in the course of employment, such employ  s shall not be entitled to the benefits of this act and shall not be included in the pay roll of the municipality under this act.

INTERSTATE COMMERCE

SEC. 18. The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this State may, with the approval of the department, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium shall be on the basis of the pay roll of the workmen who accept as aforesaid.

ELECTIVE ADOPTION OF ACT

SEC. 19. Any employer and his employ  s engaged in works not extra hazardous may, by their joint election, filed with the department, accept the provisions of this act, and such acceptances, when approved by the department, shall subject them irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Ninety per cent of the minimum rate specified in section 4 shall be applicable to such case until otherwise provided by law.

COURT REVIEW

SEC. 20. Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interest under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence (except as otherwise provided in subdivision [1] of section numbered 5) in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within twenty days following the rendition of the decision appealed from and communication thereof to the person affected thereby. No bond shall be required, except that an appeal by the employer from a decision of the department under section 9 shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay. The calling of a jury shall rest in the discretion of the court except that in cases arising under sections 9, 15 and 16 either party shall be entitled to a jury trial upon demand. It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case, and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation. In other respects the practice in civil cases shall apply. Appeal shall

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lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal adviser of the department and shall represent it in all proceedings, whenever so requested by any of the commissioners. In all court proceedings under or pursuant to this act the decision of the department shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.

CREATION OF DEPARTMENT

SEC. 21. The administration of this act is imposed upon a department, to be known as the Industrial Insurance Department, to consist of three commissioners to be appointed by the governor, One of them shall hold office for the first two years, another for the first four years, and another for the first six years following the passage and approval of this act. Thereafter the term shall be six years. Each commissioner shall hold until his successor shall be appointed and shall have qualified. A decision of any question arising under this act concurred in by two of the commissioners shall be the decision of the department. The governor may at any time remove any commissioner from office in his discretion, but within ten days following any such removal the governor shall file in the office of the secretary of State a statement of his reasons therefor. The commission shall select one of their members as chairman. The main office of the commission shall be at the state capitol, but branch offices may be established at other places in the State. Each member of the commission shall have power to issue subpoenas requiring the attendance of witnesses and the production of books and documents.

SALARY OF COMMISSIONERS

SEC. 22. The salary of each of the commissioners shall be thirty-six hundred dollars per annum, and he shall be allowed his actual and necessary traveling and incidental

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expenses; and any assistant to the commissioners shall be paid for each full day's service rendered by him, his actual and necessary traveling expenses and such compensation as the commission may deem proper, not to exceed six dollars per day to an auditor, or five dollars per day to any other assistant.

DEPUTIES AND ASSISTANTS

SEC. 23. The commissioners may appoint a sufficient number of auditors and assistants to aid them in the administration of this act, at an expense not to exceed \$5,000.00 per month. They employ one or more physicians in each county for the purpose of official medical examinations, whose compensation shall be limited to five dollars for each examination and report therein. They may procure such record books as they may deem necessary for the record of the financial transactions and statistical data of the department, and the necessary documents, forms and blanks. They may establish and require all employers to install and maintain an uniform form of pay roll.

CONDUCT, MANAGEMENT AND SUPERVISION OF DEPARTMENT

SEC. 24. The commission shall, in accordance with the provisions of this act:

1. Establish and promulgate rules governing the administration of this act.

2. Ascertain and establish the amounts to be paid into and out of the accident fund.

3. Regulate the proof of accident and extent thereof, the proof of death and the proof of relationship and the extent of dependency.

4. Supervise the medical, surgical and hospital treatment to the intent that same may be in all cases suitable and wholesome.

5. Issue proper receipts for moneys received, and certificate for benefits accrued and accruing.

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6. Investigate the cause of all serious injuries and report to the governor from time to time any violations or laxity in performance of protective statutes or regulations coming under the observation of the department.

7. Compile and preserve statistics showing the number of accidents occurring in the establishment or works of each employer, the liabilities and expenditures of the accident fund on account of, and the premium collected from the same, and hospital charges and expenses.

8. Make annual reports to the governor (one of them not more than sixty nor less than thirty days prior to each regular session of the legislature) of the workings of the department, and showing the financial status and the outstanding obligations of the accident fund, and the statistics aforesaid.

MEDICAL WITNESS

SEC. 25. Upon the appeal of any workman from any decision of the department affecting the extent of his injuries or the progress of the same, the court may appoint not to exceed three physicians to examine the physical condition of the appellant, who shall make to the court their report thereon, and they may be interrogated before the court by or on behalf of the appellant in relation to the same. The fee of each shall be fixed by the court, but shall not exceed ten dollars per day each.

DISBURSEMENT OF FUNDS

SEC. 26. Disbursement out of the funds shall be made only upon warrants drawn by the State auditor upon vouchers therefor transmitted to him by the department and audited by him. The state treasurer shall pay every warrant out of the fund upon which it is drawn. If, at any time, there shall not be sufficient money in the fund on which any such warrant shall have been drawn wherewith to pay the same,

the employer on account of whose workman it was that the warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid with interest thereon at the legal rate from the date of such payment to the date such next following contribution became payable, and if the amount of the credit shall exceed the amount of the contribution, he shall have a warrant upon the same fund for the excess, and if any such warrant shall not be so paid, it shall remain, nevertheless, payable out of the fund. The state treasurer shall to such extent as shall appear to him to be advisable keep the moneys of the unsegregated portion of the accident fund invested at interest in the class of securities provided by law for the investment of the permanent school fund. The state treasurer shall be liable on his official bond for the safe custody of the moneys and securities of the accident fund, but all the provisions of an act approved February 21, 1907, entitled "An act to provide for state depositories and to regulate the deposits of state moneys therein," shall be applied to said moneys and the handling thereof by the state treasurer.

TEST OF INVALIDITY OF ACT

SEC. 27. If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workman, or if any workman shall be adjudicated to be outside the lawful scope of this act because of remoteness of his work from the hazard of his employer's work, any such adjudication shall not impair the validity of this act in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of section 4 of this act for the creation of the accident fund, or the provisions of this act making the compensation to the workman provided in it exclusive of any other remedy on the part of the workman shall be held invalid the entire act shall be thereby invalidated except

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the provisions of section 31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this act shall not affect the validity of the act as a whole or any other part thereof.

STATUTE OF LIMITATIONS SAVED

SEC. 28. If the provisions of this act relative to compensation for injuries to or death of workmen become invalid because of any adjudication, or be repealed, the period intervening between the occurrence of an injury or death, not previously compensated for under this act by lump payment or completed monthly payments, and such repeal or the rendition of the final adjudication of the invalidity shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death: *Provided*, That such action be commenced within one year after such repeal or adjudication; but in any such action any sum paid out of the accident fund to the workman on account of injury, to whom the action is prosecuted, shall be taken into account or disposed of as follows: If the defendant employer shall have paid without delinquency into the accident fund the payment provided by section 4, such sums shall be credited upon the recovery as payment thereon, otherwise the sum shall not be so credited but shall be deducted from the sum collected and be paid into the said fund from which they had been previously disbursed.

APPROPRIATIONS

SEC. 29. There is hereby appropriated out of the state treasury the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, to be known as the administration fund, out of which the salaries, traveling and office expenses of the department shall be paid, and also all other expenses of the administration of the accident

fund; and there is hereby appropriated out of the accident fund for the purpose to which said fund is applicable the sum of \$1,500,000.00, or so much thereof as shall be necessary for the purposes of this act.

SAFEGUARD REGULATIONS PRESERVED

SEC. 30. Nothing in this act contained shall repeal any existing law providing for the installation or maintenance of any device, means or method for the prevention of accident in extra hazardous work or for a penalty or punishment for failure to install or maintain any such protective device, means or method, but section 8, 9, and 10 of the act approved March 6, 1905, entitled: "An act providing for the protection and health of employes in factories, mills or workshops, where machinery is used, and providing for suits to recover damages sustained by the violation thereof, and prescribing a punishment for the violation thereof and repealing an act entitled 'An act providing for the protection of employes in factories, mills, or workshops where machinery is used, and providing for the punishment of the violation thereof, approved March 6, 1903,' and repealing all other acts or parts of acts in conflict herewith," are hereby repealed, except as to any cause of action which shall have accrued thereunder prior to October 1, 1911.

DISTRIBUTION OF FUNDS IN CASE OF REPEAL

SEC. 31. If this act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be provided by the legislature, and in default of such legislative provision distribution thereof shall be in accordance with the justice of the matter, due regard being had to obligations of compensation incurred and existing.

SAVING CLAUSE

SEC. 32. This act shall not affect any action pending or

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cause of action existing on the 30th day of September, 1911.

Passed the House February 23, 1911.

Passed the Senate March 7, 1911.

Approved by the Governor March 14, 1911.

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(L. 1911, c. 50)

An act to create sections 2394-1 to 2394-32 of the statutes (to be included in a new chapter of the statutes to be numbered chapter 110a), relating to the liability of employers for injuries or death sustained by their employés, providing for compensation for the accidental injury or death of employés, establishing an industrial accident board,¹ defining its powers, providing for a review of its awards, and making an appropriation to carry out the provisions of this act.

ABROGATION OF DEFENSES

SEC. 1. There are added to the statutes thirty-two new sections to read: Section 2394-1. In any action to recover damages for a personal injury sustained within this State by an employé while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

1. That the employé either expressly or impliedly assumed the risk of the hazard complained of.

2. When such employer has at the time of the accident in a common employment four or more employés, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow-servant.

¹ Superseded. See p. 000.

Any employer who has elected to pay compensation as hereinafter provided shall not be subject to the provisions of this section 2394-1.

SEC. 2394-2. No contract, rule, or regulation, shall exempt the employer from any of the provisions of the preceding section of this act.

APPLICATION TO RAILROADS

SEC. 2394-3. Except as regards employés working in shops or offices of a railroad company, who are within the provisions of subsection 9 of section 1816 of the statutes as amended by chapter 254 of the laws of 1907, the term "employer" as used in the two preceding sections of this act shall not include any railroad company as defined in subsection 7 of said section 1816 as amended, said section 1816 and amendatory acts being continued in force unaffected, except as aforesaid, by the preceding sections of this act.

LIABILITY FOR COMPENSATION

SEC. 2394-4. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employé, and for his death, if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

1. Where, at the time of the accident, both the employer and employé are subject to the provisions of this act according to the succeeding sections hereof.

2. Where, at the time of the accident, the employé is performing service growing out of and incidental to his employment.

3. Where the injury is proximately caused by accident, and is not caused by willful misconduct.

And where such conditions of compensation exist for any personal injury or death, the right to recovery of such com-

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pensation pursuant to the provisions of this act, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death; in all other cases the liability of the employer shall be the same as if this and the succeeding sections of this act had not been passed, but shall be subject to the provisions of the preceding sections of this act.

"EMPLOYER" DEFINED

SEC. 2394-5. The following shall constitute employers subject to the provisions of this act within the meaning of the preceding section:

1. The State, and each county, city, town, village, and school district therein.

2. Every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employé for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.

ELECTION BY EMPLOYER

SEC. 2394-6. Such election on the part of the employer shall be made by filing with the industrial accident board,¹ hereinafter provided for, a written statement to the effect that he accepts the provisions of this act, the filing of which statement shall operate, within the meaning of section 2394-5 of this act to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and there-

¹ Superseded. See note 1, p. 1102.

after, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of the act.

"EMPLOYÉ" DEFINED

SEC. 2394-7. The term "employé" as used in section 2394-4 of this act shall be construed to mean:

1. Every person in the service of the State, or of any county, city, town, village, or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, town, village, or school district therein, provided that one, employed by a contractor, who has contracted with a county, city, town, village, school district, or the State, through its representatives, shall not be considered an employé of the State, county, city, town, village, or school district which made the contract.

2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the State (who, for the purposes of the next section of this act, shall be considered the same and shall have the same power of contracting as adult employés), but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer.

ELECTION BY EMPLOYÉ

SEC. 2394-8. Any employé as defined in subsection 1 of the preceding section shall be subject to the provisions of this act and any act amendatory thereof. Any employé as defined in subsection 2 of the preceding section shall be

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deemed to have accepted and shall, within the meaning of section 2394-4 of this act, be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

1. The employer charged with such liability is subject to the provisions of this act, whether the employé has actual notice thereof or not; and

2. Such employé shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of this act; or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of this act, such employé shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving either of such notices, shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act.

SCALE OF COMPENSATION

SEC. 2394-9. Where liability for compensation under this act exists, the same shall be as provided in the following schedule:

1. Such medical and surgical treatment, medicines, medical and surgical supplies, crutches, and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability, but not exceeding ninety days, to cure and relieve from the effects of the injury, the same to be provided by the employer; and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employé in providing the same.

2. If the accident causes disability, an indemnity which shall be payable as wages on the eighth day after the injured

employé leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows:

(a) If the accident causes total disability, sixty-five per cent of the average weekly earnings during the period of such total disability, provided that, if the disability is such as not only to render the injured employé entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance after the first ninety days shall be increased to one hundred per cent of the average weekly earnings.

(b) If the accident causes partial disability, sixty-five per cent of the weekly loss in wages during the period of such partial disability.

(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subdivision (a) and (b) respectively.

(d) Said subdivisions (a), (b), and (c) shall be subject to the following limitations:

Aggregate disability indemnity for injury to a single employé caused by a single accident shall not exceed four times the average annual earnings of such employé.

The aggregate disability period shall not, in any event, extend beyond fifteen years from the date of the accident.

The weekly indemnity due on the eighth day after the employé leaves work as the result of the injury may be withheld until the twenty-ninth day after he so leaves work; if recovery from the disability shall then have occurred, such first weekly indemnity shall not be recoverable; if the disability still continues, it shall be added to the weekly indemnity due on said twenty-ninth day and be paid therewith.

If the period of disability does not last more than one week from the day the employé leaves work as the result of the injury no indemnity whatever shall be recoverable.

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3. The death of the injured employé shall not affect the obligation of the employer under subsections 1 and 2 of this section, so far as his liability shall have become payable at the time of death; but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:

(a) In case the deceased employé leaves a person or persons wholly dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of subsection 2 of this section, to make the total compensation for the injury and death (exclusive of the benefit provided for in subsection 1), equal to four times his average annual earnings; the same to be payable unless and until the board shall direct payment in gross, in weekly installments corresponding in amount to the weekly earnings of the employé.

(b) In case the deceased employé leaves no one wholly dependent on him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of four times such average annual earnings of the employé as the average annual amount devoted by the deceased to the support of the person or persons so partially dependent on him for support bears to such average annual earnings, the same to be payable, unless and until the board shall direct payment in gross, in weekly installments, corresponding in amount to the weekly earnings of the employé; provided that the total compensation for the injury and death (exclusive of the benefit provided for in said subsection 1) shall not exceed four times such average annual earnings.

(c) Liability for the death benefits provided for in subdivisions (a) and (b) respectively shall only exist where the accident is the proximate cause of death; provided that, if the

accident proximately causes permanent total disability, and death ensues from some other cause before disability indemnity ceases, the death benefit shall be the same as though the accident had caused death; and provided further that, if the accident proximately causes permanent partial disability and death ensues from some other cause before disability indemnity ceases, liability shall exist for such percentage of the death benefits provided for in said subdivision (a) or (b) (as the case may be), as shall fairly represent the proportionate extent of the impairment of earning capacity caused by such permanent partial disability in the employment in which the employé was working at the time of the accident.

(d) If the deceased employé leaves no person dependent upon him for support, and the accident proximately causes death, the death benefit shall consist of the reasonable expense of his burial, not exceeding \$100.

METHOD OF COMPUTATION

SEC. 2394—10. 1. The weekly earnings referred to in section 2394—9 shall be one fifty-second of the average annual earnings of the employé; average annual earnings shall not be taken at less than \$375, nor more than \$750, and between said limits shall be arrived at as follows:

(a) If the injured employé has worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed.

(b) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employé of the same class working sub-

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stantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) In cases where the foregoing methods of arriving at the average annual earnings of the injured employé cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employé, and of other employés of the same or most similar class, working in the same or most similar employment, in the same or a neighboring locality, shall reasonably represent the annual earning capacity of the injured employé at the time of the accident in the employment in which he was working at such time.

(d) The fact that an employé has suffered a previous disability, or received compensation therefor, shall not preclude compensation for a later injury, or for death, but in determining compensation for the later injury, or death, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury, in the employment in which he was working at such time, and shall be arrived at according to, and subject to the limitations of, the previous provisions of this section.

2. The weekly loss in wages referred to in section 2394-9 shall consist of such percentage of the average weekly earnings of the injured employé, computed according to the provision of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.

3. The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employé:

(a) A wife upon a husband with whom she is living at the time of his death.

(b) A husband upon a wife with whom he is living at the time of her death.

(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he or they are living at the time of the death of the parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the death of the employé; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partially dependent, if any, shall receive no part thereof; and if there is more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

4. No person shall be considered a dependent unless a member of the family of the deceased employé, or bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister.

5. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employé, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees; provided that in case of the death of a dependent whose right to a death benefit has thus become fixed, so much of the same as is then unpaid shall be recoverable by and payable to his personal representative in gross. No

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person shall be excluded as a dependent who is a non-resident alien.

6. No dependent of an injured employé shall be deemed, during the life of such employé, a party in interest to any proceeding by him for the enforcement or collection of any claim for compensation, nor as respects the compromise thereof by such employé.

NOTICE OF INJURY

SEC. 2394-11. No claim to recover compensation under this act shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and address of the person injured, the time and place where the accident occurred, and the nature of the injury, and signed by the person injured or by some one on his behalf, or in case of his death, by a dependent or some one on his behalf, shall be served upon the employer, either by delivering to and leaving with him a copy of such notice, or by mailing to him by registered mail a copy thereof in a sealed and post-paid envelope addressed to him at last known place of business or residence. Such mailing shall constitute completed service. Provided, however, that any payment of compensation under this act, in whole or in part, made by the employer before the expiration of said thirty days, shall be equivalent to the notice herein required; and provided further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for collection of the claim that there was no intention to mislead the employer, and that he was not in fact misled thereby; and provided further, that if no such notice is given and no payment of compensation made, within two years from the date of the accident, the right to compensation therefor shall be wholly barred.

EXAMINATION BY PHYSICIAN

SEC. 2394-12. Wherever in case of injury the right to compensation under this act would exist in favor of any employé, he shall, upon the written request of his employer, submit from time to time to examination by a regular practicing physician, who shall be provided and paid for by the employer, and shall likewise submit to examination from time to time by regular physician selected by said industrial accident board, or a member or examiner thereof. The employé shall be entitled to have a physician, provided and paid for by himself, present at any such examination. So long as the employé, after such written request of the employer, shall refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended; and if he shall refuse to submit to such examination after direction by the board, or any member or examiner thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. Any physician who shall make or be present at any such examination may be required to testify as to the results thereof.

CREATION OF BOARD¹

SEC. 2394-13. There is hereby created a board which shall be known as the industrial accident board.¹ The commissioner of labor and industrial statistics shall be ex-officio a member of such board. He may, however, authorize the deputy commissioner to act in his place. Within thirty days after the passage of this act, the governor, by and with the advice and consent of the senate, shall appoint a member

¹ The Industrial Accident Board has been superseded by the *Industrial Commission of Wisconsin*. See sections 2394-42, Chapter 485, Laws of Wisconsin for 1911.

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who shall serve two years, and another who shall serve four years. Thereafter such two members shall be appointed and confirmed for terms of four years each. Vacancies shall be filled in the same manner for the unexpired term. Each member of the board, before entering upon the duties of his office, shall take the oath prescribed by the constitution. A majority of the board shall constitute a quorum for the exercise of any of the powers or authority conferred by this act, and an award by a majority shall be valid. In case of a vacancy, the remaining two members of the board shall exercise all the powers and authority of the board until such vacancy is filled. Each member of the board, including the said commissioner, shall receive an annual salary of \$5,000. This salary shall, as to the commissioner of labor and industrial statistics, be in full for his services as such commissioner of labor and industrial statistics.

ORGANIZATION OF BOARD¹

SEC. 2394-14. The board shall organize by choosing one of its members as chairman. Subject to the provisions of this act, it may adopt its own rules of procedure and may change the same from time to time in its discretion. The board, when it shall deem it necessary to expedite its business, may from time to time employ one or more expert examiners for such length of time as may be required, such examiners to be exempt from the operation of chapter 363 of the laws of 1905, and amendatory acts. It may also appoint a secretary, who shall be similarly exempt, and such clerical help as it may deem necessary. It shall fix the compensation of all assistants so appointed. It shall provide itself with a seal for the authentication of its orders, awards, and proceedings, upon which shall be inscribed the words "Industrial Accident Board—Wisconsin—Seal." It shall keep its office at the capitol, and shall be provided by the superintendent

¹ Superseded. See note 1, page 1102.

of public property with a suitable room or rooms, necessary office furniture, stationery, and other supplies. The members of the board and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the board; but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board, before payment is made. All salaries and expenses authorized by this act shall be audited and paid out of the general funds of the State, the same as other general expenses are audited and paid.

SUBMISSION OF DISPUTES

SEC. 2394-15. Any dispute or controversy concerning compensation under this act, including any in which the State may be a party, shall be submitted to said industrial accident board in the manner and with the effect provided in this act. Every compromise of any claim for compensation under this act shall be subject to be reviewed by, and set aside, modified, or confirmed by the board upon application made within one year from the time of such compromise.

NOTICE OF HEARING

SEC. 2394-16. Upon the filing with the board by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, it shall fix a time for the hearing thereof, which shall not be more than forty days after the filing of such application. The board shall cause notice of such hearing, embracing a general statement of such claim, to be given to each party interested, by service of such notice on him personally or by mailing a copy thereof to him at his last known postoffice address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the board and hearings may be

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held at such places as the board shall designate. Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the board; but the board may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and pay roll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time direct any employé claiming compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing. The board, or any member thereof, or any examiner appointed thereby, shall have power and authority to issue subpoenas, to compel the attendance of witnesses or parties, and the production of books, papers, or records, and to administer oaths. Obedience to such subpoenas shall be enforced by the circuit court of any county.

FINDINGS AND AWARDS

SEC. 2394-17. After final hearing by said board, it shall make and file (1) its findings upon all facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties. Pending the hearing and determination of any controversy before it, the board shall have power to order the payment of such, or any part, of the compensation, which is or may fall due, as to which the party from whom the same is claimed does not deny liability in good faith within ten days after the giving of notice of hearing provided for in the preceding section; and if the same shall not be paid as required by such order, the facts with respect to the liability therefor, and the determination of the board as to the rights of the parties, shall be embraced in, and constitute a part of, its findings and awards; and the

board shall have the power to include in its award, as a penalty for noncompliance with any such order, not exceeding twenty-five per cent of each amount which shall not have been paid as directed thereby.

FILING OF JUDGMENT

SEC. 2394-18. Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render a judgment in accordance therewith; which judgment, until and unless set aside as hereinafter provided, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed.

REVIEW BY COURT

SEC. 2394-19. The findings of fact made by the board acting within its powers shall, in the absence of fraud, be conclusive; and the award, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within twenty days from the date of the award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the board for the review of such award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall also state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the board, or any member of the board, shall be deemed completed service. The board shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the board shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its findings and award. Said action thereupon be

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brought on for hearing before said court upon such record by either party on ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the board acted without or in excess of its powers.
2. That the award was procured by fraud.
3. That the findings of fact by the board do not support the award.

REMANDING OF RECORD

SEC. 2394-20. Upon the setting aside of any award the court may recommit the controversy and remand the record in the case to the board, for further hearing or proceedings; or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such award, and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties.

APPEAL FROM AWARD

SEC. 2394-21. Said board, or any party aggrieved by a judgment entered upon the review of any award, may appeal therefrom within the time and in the manner provided for an appeal from the orders of the circuit court; but all such appeal shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as state causes on such calendar.

FEES AND COSTS

SEC. 2394-22. No fees shall be charged by the clerk of any court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies of transcripts thereof. In proceedings to review an award, costs as between the parties shall be allowed or not in the discretion of the court, but no costs shall be taxed against said board. In any action for the review of an award, and upon any appeal therein to the supreme court, it shall be the duty of the attorney general, personally, or by an assistant, to appear on behalf of the board, whether any other party defendant shall have appeared or be represented in the action or not. Unless previously authorized by the board, no lien shall be allowed, nor any contract be enforceable, for any contingent attorneys' fee for the enforcement or collection of any claim for compensation where such contingent fee, inclusive of all taxable attorneys' fees paid or agreed to be paid for the enforcement or collection of such claim, exceeds ten per cent of the amount at which such claim shall be compromised, or of the amount awarded, adjudged, or collected.

ASSIGNMENT OF CLAIM

SEC. 2394-23. No claim for compensation under this act shall be assignable before payment, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, adjudged, or paid, be subject to be taken for the debts of the party entitled thereto.

PREFERENCE OF CLAIM

SEC. 2394-24. The whole claim for compensation for the injury or death of any employé or any award or judgment thereon, shall be entitled to a preference over the unsecured debts of the employer hereafter contracted, but this section

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shall not impair the lien of any judgment entered upon any award.

THIRD PARTY LIABILITY

SEC. 2394-25. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment of any cause of action in tort which the employé or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party.

INSURANCE PROVISIONS

SEC. 2394-26. Nothing in this act shall affect the organization of any mutual or other insurance company, or any existing contract for insurance of employers' liability, nor the right of the employer to insure in mutual or other companies, in whole or in part, against such liability, or against the liability for the compensation provided for by this act, or to provide by mutual or other insurance, or by arrangement with his employés, or otherwise, for the payment to such employés, their families, dependents, or representatives, of sick, accident, or death benefits in addition to the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contribution, or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right to enforce in his own name, in the manner provided in this act, the liability of any insurance company which may, in whole or in part, have insured the liability for such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance company, shall, to the extent thereof, be a bar to

recovery against the other of the amount so paid, and provided further, that as between the employer and the insurance company, payment by either directly to the employé, or to the person entitled to compensation, shall be subject to the conditions of the insurance contract between them.

SEC. 2394-27. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract of insurance unless such company shall have been approved by the commissioner of insurance, as provided by law. For the purposes of this act, each employé shall constitute a separate risk within the meaning of section 1898d of the statutes.

RELEASE FROM LIABILITY

SEC. 2394-28. Any employer against whom liability may exist for compensation under this act may, with the approval of the industrial accident board, be relieved therefrom by:

1. Depositing the present value of the total unpaid compensation for which such liability exists, assuming interest at three per centum per annum, with such trust company of this State as shall be designated by the employé (or by his dependents, in case of his death, and such liability exists in their favor), or in default of such designation by him (or them) after ten days' notice in writing from the employer, with such trust company of this State as shall be designated by the board; or

2. By the purchase of an annuity, within the limitations provided by law, in any insurance company granting annuities and licensed in this State, which may be designated by the employé, or his dependents, or the board, as provided in subsection 1 of this section.

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POSTING OF NOTICES

SEC. 2394-29. The board shall cause to be printed and furnished free of charge to any employer or employés such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of every employer who shall file a statement of election under this act, and the date of the filing thereof, and a separate book in which shall be entered and indexed the name of every employer who shall file his notice of withdrawal of such election, and the date of the filing thereof; and books in which shall be recorded all orders and awards made by the board, and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause notice of the fact to be given to his employés, by posting such notice thereof in several conspicuous places in the office, shop, or place of business of the employer, or by publishing, or in such other manner as the board shall deem most effective; and the board shall likewise cause notice to be given of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and notices of withdrawal of election, and of the time of the filing of the same, shall conclusively be imputed to all employés.

APPROPRIATION

SEC. 2394-30. A sum sufficient to carry out the provisions of this act is hereby appropriated out of any money in the treasury not otherwise appropriated.

SEC. 2394-31. All acts or parts of acts inconsistent with

this act are to be deemed replaced by this act, and to that end are hereby repealed.

LEGISLATIVE INTENT

SEC. 2394-32. The legislature intends the contingency in subdivision 2 of section 2394-1 of this act to be a separable part thereof, and the subdivision likewise separable from the rest of the act, and that part of said section 2394-1 that follows subdivision 2, likewise separable from the rest of the act; so that any part of said subdivision, or the whole, or that part which follows said subdivision 2, may fail without affecting any other part of the act.

SEC. 2. Section 2394-3 to 2394-32, inclusive, shall take effect and be in force from and after the passage and publication of this act, and the entire act shall be in force from and after September 1st, 1911.

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